***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*No. 19,052*

JAMES R. BLOHM,

*Appellant,*

v.

WALTER N. TOBRINER,
F. J. CLARKE,
JOHN B. DUNCAN,
*Board of D.C. Commissioners,*

*Appellees.*

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*Appeal From a Judgment of the United States District Court for the District of Columbia*



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## STATEMENT OF QUESTIONS PRESENTED

1. Whether the Board of Commissioners of the District of Columbia acted arbitrarily or capriciously in affirming the order of the Police and Firemen's Retirement and Relief Board of the District of Columbia, ordering the retirement of a Metropolitan Police Officer under Title 4, Section 526 of the District of Columbia Code, "Retirement for Disability Not Incurred in Performance of Duty," when the evidence required a finding by the Commissioners that said police officer had become disabled due to injury received or disease contracted in performance of duty, and there was no evidence upon which their actual finding could have properly been made.

2. Whether under Title 4, Section 526 of the District of Columbia Code, the burden is upon the appellees to establish that the appellant had "become disabled due to injury received or disease contracted other than in the performance of duty" in order to retire him from disability other than in the line of duty and, if so, did appellees sustain such burden.

3. Whether under Title 4-527(1) of the District of Columbia Code, prior to its amendment on October 23, 1962 (Public Law 87-857) appellant should have been retired for disability incurred in the line of duty, or at the very least that a condition of uncertain origin was aggravated in the line of duty resulting in appellant's disability to perform his work.

4. Whether Title 4, 527(2) (Public Law 87-857) of the District of Columbia Code as amended on October 23, 1962, was applicable to appellant's case which had not been finally determined at time of passage of said Act, and he should have been retired for disability incurred in the line of duty.

5. Was it the duty of the Police and Firemen's Retirement and Relief Board of the District of Columbia and/or the appellees to have examined into and considered at time of hearing for disability retire-

ment of the appellant, the matter of a diagnosis made on March 14, 1960, by Dr. Harrell, member of the Board of Police and Fire Surgeons, that the appellant was suffering from "Post-Traumatic Headaches."

6. Whether appellees' action in granting appellant excess sick leave and paying his hospital and medical bills pursuant to the provisions of the Police Manual was an acknowledgement that appellant's headaches were contracted in line of duty and therefore constituted a bar against appellees to claim otherwise.

7. Whether appellees imposed an improper and unlawful burden of proof upon appellant by requiring him to show by substantial evidence that his disability resulted from performance of duty.

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## CASES CITED



## STATUTES AND REGULATIONS

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*No. 19,052*

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*Appeal From a Judgment of the United States District Court for the District of Columbia*

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## BRIEF FOR APPELLANT

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### JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia denying appellant's complaint for Mandatory Injunction entered on October 9, 1964; this appeal was filed November 3, 1964.

This Court has jurisdiction by virtue of 28 U.S.C. Sections 1291, 1294 and 2106 to review the judgment of the Court below.

The complaint filed in the Court below was for a Mandatory Injunction Directing Retirement of Police Officer for Disability Incurred While Performing Duty and Directing Reversal of the Order Retiring Police Officer for Disability Not Incurred While Performing Duty ~~and Directing Reversal of the Order Retiring Police Officer for Disability Not Incurred in Performance of Duty~~ (J.A. 1), alleging in substance that the Commissioners of the District of Columbia acted arbitrarily and capriciously in affirming the order of the Police and Firemen's Retirement and Relief Board in ordering the retirement of appellant, a member of the Metropolitan Police Department of the District of Columbia for disability not incurred in the line of duty. Jurisdiction in the Court below is based on Title 11, Section 306 of the District of Columbia Code.

## STATEMENT OF THE CASE

Appellant was appointed as private in the Metropolitan Police Department for the District of Columbia on March 16, 1951, and served as such until his retirement for disability on April 30, 1962. On July 1, 1953, appellant was assigned to the motorcycle squad in said department and served as a motorman until his retirement, as aforesaid.

On June 20, 1957, while on duty on his motorcycle in attempting to apprehend a traffic violator, the appellant collided with an automobile and was thrown ninety-five feet from his motorcycle. He was removed unconscious to Casualty Hospital, where he remained for several days. Appellant sustained a severe cerebral concussion (first diagnosed as a fractured skull) and other serious and substantial injuries. He was off from work for a period of about six months.

Following the aforesaid accident, the appellant started having headaches, which became worse and more frequent as time went along. Commencing about January 1960, because of said headaches, the appellant commenced losing considerable time from his duties. He received treatment at the Police and Firemen's Clinic. Appellant had no history

of headaches nor had he ever lost any time from duty because of headaches prior to said accident of June 20, 1957.

On March 14, 1960, Dr. Harrell, a member of the Board of Police and Fire surgeons, diagnosed appellant's ailment as "Post-Traumatic Headaches." Appellant received medical treatment by the Police Department's physicians and several tests were made in connection with appellant's complaints of headaches. He was finally ordered to appear before the Police Retirement Board for hearing as to whether or not the appellant should be retired for disability.

Appellant appeared before said Board on April 5, 1962, and testimony was taken and recorded (Plaintiff's Exhibit No. 1, J.A. 15-33). Dr. Hyman Shapiro, member, Board of Police and Fire Surgeons, testified that the appellant had had intensive treatment for his headaches over a period of three years and that said treatment has been of no avail in relieving the appellant; that he was of the opinion that appellant is no longer able to do the work of a policeman and that his condition is a psycho-physiological musculoskeletal reaction, tension headache, of a vascular type. He therefore recommended that appellant be considered for retirement for disability. Dr. Shapiro further testified that he felt this was not the type of headache that one sees as a post-traumatic type of headache; however, that he did not eliminate the possibility. (J.A. 18) Dr. Shapiro also testified before the Board that there were subjective medical findings of a post-traumatic nature (J.A. 19).

Dr. Shapiro further testified before the Board that appellant's past history is non-contributory and is negative prior to the accident of June 20, 1957; that his headaches started in June of 1957.

Appellant testified before the Retirement Board that he attributed his headaches to the aforesaid accident; that he had had no other injuries since then; that he had no emotional problems; further, that he did not want to retire.

On April 17, 1962, the Retirement Board rendered its decision that appellant was physically incapacitated for further duty by reason of disability; that "A review of the record and the testimony supplied at the hearing failed to show substantial evidence on which the Police and Firemen's Retirement and Relief Board could conclude that Private Blohm's disability resulted from police duty. Accordingly he was retired by unanimous action of the Police and Firemen's Retirement and Relief Board" for disability not arising from the performance of duty." Appellant's retirement was made under Title 4-526 of the District of Columbia Code, effective as of April 30, 1962.

Appellant appealed the Board's decision to the appellee, Board of Commissioners, and requested that the decision of the Retirement Board be reversed and that he be retired pursuant to Title 4, Section 527(1) of the District of Columbia Code. The Board of Commissioners sustained the action of the retirement Board on October 18, 1962.

Appellant then filed this present action for Mandatory Injunction directing retirement for disability incurred in the performance of duty. Appellant contends that the action of the appellees was arbitrary, capricious and contrary to the law and evidence; he contends that he should have been retired for disability incurred in performance of duty pursuant to Title 4-527(1) of the District of Columb ia Code and/or under the provisions of Title 4-527(2) of said Code (Public Law 87-857).

In the Court below appellant urged that the Retirement Board did not consider or examine into Dr. Harrell's diagnosis of "Post-Traumatic Headaches"; that said diagnosis was important and pertinent information which the Board should have taken into account. He further contended that said Board imposed an erroneous rule of law, that the "testimony supplied at the hearing failed to show substantial evidence on which the Police and Firemen's Retirement and Relief Board could conclude that Private Blohm's disability resulted from police duty."

Appellant also urged below that the action of the appellees in granting appellant approximately thirty days excess sick leave because of said headaches was an acknowledgment that appellant's headaches were incurred in line of duty and is entirely inconsistent with their later order which is here under attack by appellant. Appellees stipulated the introduction of appellant's personnel records with reference to said excess sick leave, showing that the Board of Commissioners had approved said excess sick leave and paid medical bills on the ground that said excess sick leave and said medical bills were for injuries sustained in line of duty. Appellees also stipulated to the introduction of Section 9 of Chapter XXXIV of the Police Manual which provided that the appellant as well as other police officers were only entitled to thirty days sick leave "except when the same is in direct consequence of injury received or disease contracted in the actual performance of duty * * * and then only after the surgeon or surgeons have stated the cause of such absence, certified to its legality, recommended its allowance and the same has been approved by the Commissioners." Said records indicated that Dr. Harrell had diagnosed the appellant's headaches as "Post-Traumatic Headaches" and he recommended allowance of said excess sick leave.

The Court in its Memorandum Opinion and Order of October 9, 1964, held that Dr. Harrell's diagnosis was in fact before the respective bodies which passed judgment as to the disability of the appellant; that even if this diagnosis had not been before the Retirement Board and appellees, its absence would not have been prejudicial in the light of all the other medical testimony. The Court further found that the action taken by the appellees was not arbitrary or capricious but was in fact clearly justified and warranted by the record; that Title 4, Section 527(2) of the District of Columbia Code was not retroactive. Therefore, for the foregoing reasons the complaint for Mandatory Injunction was denied and judgment entered in favor of appellees.

## STATUTES, REGULATIONS INVOLVED

**Title 4, Section 525, D. C. Code, 1951 Edition, Supp. VII**

*Medical and Hospital service — Payment of by District on certificate of commissioners.*

"Whenever any member shall become temporarily disabled by injury received or disease contracted in the performance of duty, to such an extent as to require medical or surgical services, other than such as can be rendered by the Commissioners, or to require hospital treatment, the expense of such medical or surgical services, or hospital treatment, shall be paid by the District of Columbia; but no such expense shall be paid except upon a certificate of the Commissioners setting forth the necessity for such services or treatment and the nature of the injury or disease which rendered the same necessary. (Aug. 21, 1957, 71 Stat. 394, 85-157, Sec. 3(12e).)"

**Title 4, Section 526, D. C. Code, 1951 Edition, Supp. VII:**

*Retirement for disability not incurred in performance of duty.*

"Whenever any member coming under sections 4-521 to 4-535 completes five years of police or fire service and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at time of retirement. *Provided further*, That the annuity of a member retiring under this section shall be at least 40 per centum of his basic salary at the time of retirement. (Aug. 21, 1957, 71 Stat. 394, Pub. L. 85-157, Sec. 3(12f).)"

**Title 4, Section 527(1), D. C. Code, 1951 Edition, Supp. VII:**

*Retirement for disability incurred while performing duty.*

> "(g) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided,* That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement. (Aug. 21, 1957, 71 Stat. 394, Pub. L. 85-157, Sec. 3(12g).)"

**Title 4, Section 527(2) (Public Law 87-857), District of Columbia Code, 1961 Edition, with amendments:**

> "In any case in which the proximate cause of an injury incurred or disease contracted by a member is *doubtful,* or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: *Provided,* That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement."

**Section 9, Chapter XXIV**, of the **Police Manual** containing the rules and regulations for the government of the Police Department promulgated

by the Commissioners under the authority of Section 1 of the Act of February 28, 1901, 31 Stat. 819, as amended by the Act of June 8, 1906, 34 Stat. 221, D. C. Code (1929), Title 20, Section 472:

> "The board of surgeons, acting as such board, or members thereof in their individual capacity as such members, shall determine and shall be the only judges as to what amount of sick leave, if any, shall be granted any member of the force. **Provided, however, that in no case will sick leave be allowed any member of the force in excess of 30 days in any one calendar year, except when the same is in direct consequence of injury received (or disease) contracted in the actual performance of duty, * * * and then only** after the surgeon or surgeons have stated the cause of such absence, certified to its legality, recommended its allowance, and the **same has been approved by the commissioners.**" (Emphasis supplied)

## STATEMENT OF POINTS

It was error for the District Court in finding that the action taken by the Retirement Board and appellees was not arbitrary or capricious and in denying appellant's Complaint for Mandatory Injunction because:

1. The Retirement Board and appellees ignored the evidence and improperly and unlawfully retired appellant for disability not incurred in line of duty, rather than for disability incurred in the line of duty pursuant to Title 4, Section 527(1) of the District of Columbia Code.

2. That at least, wherein appellant's performance of duty had aggravated a prior condition or a condition of uncertain origin and such aggravation permanently disabled him from the performance of duty, the appellant should have been retired for injuries sustained in line of duty pursuant to Title 4, Section 527(1) of the District of Columbia Code.

3. The Court erred in holding that Title 4-527(2) of the District of Columbia Code, approved October 23, 1962, was not retroactive to afford appellant the benefits of that Section.

4. Retirement Board and appellees imposed an improper and unlawful burden of proof upon appellant by requiring him to show by substantial evidence that appellant's disability resulted from police duty; that appellees failed to establish by burden of proof that appellant's disability arose other than in line of duty.

5. Retirement Board and appellees ignored substantial and pertinent evidence, namely, Dr. Harrell's diagnosis of "Post-Traumatic Headaches."

6. Appellees' action in granting appellant excess sick leave and paying his hospital and medical bills was an acknowledgement that appellant's headaches were contracted in line of duty.

## SUMMARY OF ARGUMENT

A finding not supported by the evidence must be set aside. The finding of the Police and Firemen's Retirement and Relief Board that appellant was disabled due to injury or disease contracted other than in the performance of duty is not supported by evidence. Appellees, in reviewing the decision of the Police and Firemen's Retirement and Relief Board, acted either arbitrarily or capriciously in failing to reverse such an erroneous finding and therefore appellees' affirmance should have been enjoined by the Court below. The Court also erred in holding that the provisions of Title 4, 527(2) of the District of Columbia Code (Public Law 87-857) was not retroactive and that its provisions were not applicable to appellant; further, the Court erred in finding that a diagnosis by Dr. Harrell, Member of the Board of Police Surgeons, made on March 14, 1960, was before the Police and Firemen's Retirement Board at the time it heard appellant's retirement matter. The Court further erred in holding that even if said diagnosis was not before the Board, its absence would not have been prejudicial to the appellant.

The Court erred in not holding that the finding of the said Retirement Board and the appellees was erroneous in requiring the appellant

to present substantial evidence on which the Retirement Board could conclude that the appellant's disability resulted from police duty. (Plaintiff's Exhibit No. 2, J.A. 44, 45, 46)

The evidence presented to the Court below consisting of the transcripts of the hearing before the Police and Firemen's Retirement and Relief Board, stipulations between attorneys for the appellant and appellees and other exhibits introduced into evidence revealed that the appellant had contracted his headaches in line of duty; that he had had a serious accident in June 1957 while on duty and had sustained, among other serious injuries, a severe concussion of the brain; that his headaches had commenced shortly after said accident; that he had never had any history of headaches before said accident and that he attributed his headaches to the accident; that in effect his headaches were aggravated by his work as a motorcycle policeman; that he had not sustained any other injuries since said accident.

Dr. Harrell, member of the Board of Police and Fire Surgeons, on March 14, 1960, diagnosed appellant's headaches as "Post-Traumatic Headaches." Dr. Hyman Shapiro. member of said Board of Surgeons, recommended the appellant's retirement for disability because of said headaches, in that appellant was not able to perform any longer his duties as a policeman. Dr. Shapiro's medical findings were that appellant's condition was a psychophysiological musculoskeletal reaction, tension headache, of a vascular type; that while he felt he could not state that this was a type of headache that one sees as a post-traumatic type of headache, he did not eliminate the possibility. However, Dr. Shapiro did testify before the Retirement Board that there were subjective medical findings of a post-traumatic nature.

Title 4-527(1), providing for retirement, casts the burden of proof upon the appellees to find that the officer has "become disabled due to injury received or disease contracted other than in the performance of duty" in order to retire the officer for disability other than in the line

of duty. The same burden of proof is placed on the appellees under Title 4-527(2) of the District Code.

There is nothing in the record to establish that the condition from which the appellant is suffering is due to disease or injury contracted other than in the performance of duty. The factual and medical evidence is strongly and substantially in favor of the appellant that his headache's were contracted in line of duty; and the appellees have acknowledged that fact by granting the appellant excess sick leave for his headaches and paying his medical expenses. Further, the Retirement Board and appellees have failed to consider pertinent and substantial diagnosis of Dr. Harrell that the appellant was suffering from post-traumatic headaches.

## ARGUMENT

### I.

### The Retirement Board and Appellees Ignored the Evidence and Improperly and Unlawfully Retired Appellant for Disability Not Incurred in Line of Duty, Rather Than for Disability Incurred in the Line of Duty Pursuant to Title 4, Section 527(1) of the District of Columbia Code

On October 18, 1962, appellees affirmed the order of the Retirement Board retiring appellant for disability not incurred in the performance of his duties as a police officer, effective April 30, 1962.

Retirement of members of the Metropolitan Police Department is provided for in Title 4, District of Columbia Code, amended effective October 1, 1946, Secs. 4-521 through 4-535 cited as the "Policemen and Firemen's Retirement and Disability Act."

The order complained of was issued under Title 4-526, Retirement for Disability not incurred in the Performance of Duty. This section requires a finding by the Commissioners, appellees herein, that the member has become disabled due to injury received or disease con-

tracted other than in performance of duty. The retirement under this section provides for an annuity computed at the rate of 2% of the officer's basic salary at the time of his retirement for each year or portion thereof of his service with a minimum of 40%, which amount is subject to Federal and State income tax.

Appellant contends that he should have been retired under Title 4-527(1) and/or under Title 4-527(2) of the D. C. Code (Br., p. 7) Title 4-527(1) provides in substance that when a member is injured or contracts a disease in performance of duty and such injury or disease permanently disables him from the performance of duty, he shall receive an annuity of not less than 66 2/3 of his basic salary at the time of his retirement (which is not subject to Federal or State income tax.) (Br., p. 7) Title 4-527(2) is an amendment to Title 4-527(1) which was enacted on October 23, 1962 (Public Law 87-857). Said section provides in part:

> "In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. . . ."

It is undisputed that appellant has been permanently disabled for the performance of his duty, for otherwise he would not have been retired at all for disability.

It is well established that a trier of facts, be it judge, jury, or, as in this case, a retirement board, cannot disregard testimony which is all one way, or is substantially all one way, and is not immaterial. Thus, this Court in the Case of *Stone v. Stone*, 78 U.S. App. D.C. 5, 8, 136 F.2d 761, stated in part:

> "In this case there was positive testimony uncontradicted and not inherently improbable. Neither a Jury, nor a Judge is at liberty to disregard such evidence * * * and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results for which the verdict or decision, if reviewable, must be set aside."

It is also well established that while appellees have "administrative authority" they cannot act arbitrarily and their actions in retirement matters are subject to judicial review. See *Spencer v. Bullock*, 94 U.S. App. D.C. 388, 216 F.2d 54, where Judge Fahy in his dissenting opinion stated, at page 392: "The Commissioners may not be arbitrary, however, and their action is subject to appropriate judicial review."

In the case of *Crawford v. McLaughlin, et al.*, 109 U.S. App. D.C. 264, 286 F.2d 821, this Court discussed the "humane purpose of such retirement laws" and stated in pertinent part:

> "We find no evidence that the disabling condition grew out of any injury received or disease contracted other than in the performance of duty. . . .
>
> "Since the evidence supports only a conclusion attributing the disability to injury received in the performance of duty, plaintiff is entitled to be retired under section 4-527. The writ sought should accordingly be issued. We are fortified in this conclusion by consideration of the humane purpose of such retirement laws. See *Bradley v. City of Los Angeles*, 55 Cal. App. 2d 592, 131 P.2d 391 (1942). This purpose would partially fail of accomplishment were the evidence in this record held to be insufficient to support retirement under section 4-527."

In the instant case on appeal herein, Dr. Hyman Shapiro's testimony before the Retirement Board was that treatment had been of no avail in relieving the appellant of his headaches and that because of this the appellant was no longer able to do the work of a policeman; that his

condition is a psychophysiological musculoskeletal reaction, tension headache, of a vascular type. Dr. Shapiro therefore recommended that the officer appear before the Retirement Board for consideration of his retirement. (Plaintiff's Exhibit No. 1, J.A. 16, 17, 18)

Dr. Shapiro also stated that he felt that this was not the type of headache that one sees as a post-traumatic type of headache. "However, this did not eliminate the possibility." (J.A. 18). In answer to Mr. Howard's question at the Retirement Board hearing, "And I gather then there is no subjective medical findings of a post-traumatic nature there?" Dr. Shapiro's answer was: "Subjective, yes; in that the man alleged that the onset of his headaches --" (J.A. 19).

Dr. Shapiro's report of March 6, 1962, which was read into the evidence at the hearing before the Retirement Board, contained the following (J.A. 16, 17, 18):

> "His past history is non-contributory * * * and previous history is negative and non-contributory insofar as his present condition is concerned up to June 20, 1957.
>
> "His present illness, he states, started after he was in a collision while on his motorcycle and with an automobile on June 20, 1957. * * * He was seen at the time by Dr. Norman Horwitz, a Neurosurgeon, who felt he had a possible fracture of the skull, but this was later eliminated and he was treated for a cerebral concussion. * * * According to the history given by Dr. Rizzoli, his headaches started in the summer of 1958, which would be a year after the injury. He says they were located on the right side of the head. I note, however, that there was a similar history of headaches that followed his injury previously in June of 1957, so actually it started in June of '57 rather than in the summer of 1958. The man denied any emotional stresses at the time. * * *"

On the medical log sheet, which is part of Plaintiff's Exhibit No. 1 (J.A. 42-43), showing appellant's medical history, there is an entry by Dr. Harrell, member of the Board of Police and Fire Surgeons, under date of June 20, 1957, that the appellant made twenty-five clinic visits for "Fr. R. ulna, Cerebral Concussion"; that appellant was absent for a total of 117 days.

On said log sheet there is also a diagnosis by Dr. Harrell of Post Traumatic Headaches under date of March 14, 1960, showing three clinic visits and an absence of seven days because of said headaches. (J.A. 43)

It was stipulated at the trial in the Court below that Dr. Harrell had recommended excess sick leave based on his diagnosis of "Post Traumatic Headaches" and that the appellees had approved said sick leave and paid for appellant's medical bills by reason of said headaches on the ground that said illness was contracted in line of duty (See reported testimony at trial, J.A. 48-55).

In *Hamilan Corporation v. O'Neill*, 106 U.S. App. D.C. 354, 273 F.2d 89, a case involving emotional distress of plaintiff from an injury caused by drinking from a glass with crushed ice and glass, this Court upheld the lower Court's charge to the jury, in effect, that if a plaintiff suffers substantial physical injuries which proximately cause **secondary physical effects or nervous or emotional or psychological disabilities, she may recover damages for such secondary physical effects or nervous or emotional or psychological disabilities** as stem from the original physical injury in an unbroken chain of causation. See also *Perry v. Capital Transit Co.*, 59 App. D.C. 42, 32 F.2d 938.

The appellant's headaches have been diagnosed as "tension type" of headaches and that appellant "may well have some emotional problems." (Plaintiff's Ex. No. 1, J.A. 37) Assuming that appellant's headaches were caused by some emotional problem, the record is uncontradicted that aside from his employment the appellant has had no

emotional problems; that the only emotional problem that can be attributed to the appellant is that he definitely believes his headaches are the result of the injuries which he sustained in June 1957. He made that assertion on several occasions at the hearing before the Retirement Board. Therefore it must be conclusively presumed that if appellant has any emotional problem, it is because of his consistent and constant belief that his headaches are the result of said accident. It is well recognized law that secondary physical effects or nervous or emotional or psychological disabilities as stem from the original substantial physical injury in an unbroken chain of causation, are compensable as injuries arising out of and caused by said original injury, even though the claimant has fully recovered from said original injury. ***Hamilan Corporation v. O'Neill, supra,*** and ***Perry v. Capital Transit Co., supra,*** are leading authorities on this proposition.

In ***Phoenix Assurance Company of New York, et al. v. Britton,*** 110 U.S. App. D.C. 118, 289 F.2d 784, this Court held that the Workmen's Compensation laws are to be construed liberally in favor of injured employees and their dependents; also that doubts should be resolved in favor of the employee or his dependent family. In ***Hyde v. Tobriner,*** __ U.S. App. D.C. __, 329 F.2d 879, this Court held:

> "In evaluating the evidence consideration must be given to the humane purpose of such retirement laws. **Accordingly the evidence must be viewed in a light more favorable to the applicant seeking relief than in the usual type of civil action."** (Emphasis supplied)

From the evidence and records presented and under the aforegoing opinions, the Court below should have granted appellant's complaint for Mandatory Injunction.

Dr. Shapiro's opinion and testimony upon which the Board founded its decision was certainly equivocal and ambiguous. In one breath he states that he feels he could not relate appellant's headaches to the

injury suffered by the appellant in June 1957 and yet on the other hand he states, "**However, this did not eliminate the possibility.**" Dr. Shapiro further testified that the appellant had subjective symptoms of a post-traumatic nature. Therefore, the medical opinion upon which the appellees relied is certainly not in favor of the appellees. The medical testimony of Dr. Shapiro is in appellant's favor.

Considering the factual situation, the medical testimony in favor of appellant and the fact that the appellees had acknowledged that the appellant's headaches were in direct consequence of injuries sustained in line of duty, the Court should have found that there was substantial evidence to support the claim of the appellant and that the Retirement Board and appellees ignored the evidence and improperly and unlawfully retired him for disability not incurred in line of duty, rather than for disability incurred in the performance of duty. In support of this statement appellant contends:

The evidence and record shows that in June 1957, the appellant in line of duty sustained, among other substantial injuries, a severe cerebral concussion; that he received hospital and medical care; that he was off work for a period of six months; that commencing right after the accident he commenced having headaches which became worse and more frequent as time went along; that commencing about January 1960 appellant started to lose considerable time from his duties because of said headaches; that prior to said accident appellant had no history of headaches nor had he ever lost any time from duty because of headaches; that he attributed said headaches to the accident in June 1957; that he had no other injuries since then; that he had no emotional problems; that he did not want to retire; that he could not do his work as a motorcycle policeman because of said headaches.

The medical evidence in favor of the appellant is that Dr. Harrell on March 14, 1960, diagnosed appellant's ailment as "Post-Traumatic Headaches"; that Dr. Shapiro stated he did not eliminate the possibility

that the headaches were caused by the accident in June 1957, and that he found subjective symptoms of a post-traumatic nature.

Further in support of the appellant's contention is the medical opinion of Dr. Shapiro that appellant's past history is non-contributory and is negative prior to the accident of June 1957; that his headaches started in June of 1957; that intensive treatment of appellant's headaches were of no avail and therefore Dr. Shapiro was of the opinion that appellant could no longer do the work of a policeman and he recommended retirement for disability.

The appellees definitely acknowledged that appellant's headaches were in direct consequence of injury received or disease contracted in the actual performance of duty, and appellees approved the granting of approximately thirty days of excess sick leave to the appellant and paid his medical bills.

## II

## That at Least, Wherein Appellant's Performance of Duty Had Aggravated a Prior Condition or a Condition of Uncertain Origin and Such Aggravation Permanently Disabled Him From the Performance of Duty, the Appellant Should Have Been Retired for Injuries Sustained in Line of Duty Pursuant to Title 4, Section 527(1) of the District of Columbia Code

Prior to the enactment of the new legislation, Title 4-527 of the retirement law provided, in part, that:

> "Whenever any member is injured or contracts a disease in the performance of duty or **such injury or disease is aggravated by such duty at any time after appointment**, and such injury or disease or aggravation permanently disables him for the performance of duty he shall be retired at the greater disability rate." (Emphasis supplied)

The bold-face words above, "**such injury or disease is aggravated by such duty at any time after appointment**," clearly indicate that an aggravation in line of duty should be treated as equivalent to an injury in line of duty.

In the absence of a statute to the contrary, it is well settled law that one is deemed to be injured as the result of an accident for which he can recover damages or in the case of an employee, receive workmen's compensation, to the full extent of the disabilities arising from such accident, even though the injuries may have been aggravated by reason of a pre-existing physical condition, or by reason of a latent disease, rendering the injuries more serious than they would have been had the person been in robust health. Where the result of an accident or of employment is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, such accident or employment is in fact the cause of the resultant disability.

Acceleration or aggravation of a pre-existing disease or injury is in law an injury in the occupation causing such acceleration. Thus, in the case of *Bradley v. City of Los Angeles, supra,* the court stated in pertinent part as follows (emphasis supplied):

> "The **policy** of this state is to construe provisions of the character involved **liberally**, serving as they do a beneficial purpose. The word **injury** as used in the charter hereinabove quoted is **not limited** in its interpretation to injuries caused by external violence, physical force, or as a result of accident in the sense that the word is commonly used and understood **but it is given a much broader and liberal meaning. So construed, it includes any injury or disease arising out of and in the course of the employment which causes the incapacity or death.** Such legislation should be applied fairly and broadly with a view to confer the benefits intended. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration * * *

> It is the hazard of the employment acting upon the particular employee in his condition of health, and not what that hazard would be if acting on a healthy employee * * * Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment, because it develops within it."

Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 902(2), applicable to Workmen's Compensation cases in the District of Columbia, the word "injury" is defined, but the definition makes no mention of the word "aggravation." The aforementioned section reads as follows:

> "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of this employment."

Despite the absence of any mention of "aggravation" as being included, it has been consistently held by this Court that an act which is done by an employee in the course of his work ordinary and usual in character, which aggravates a pre-existing condition, is compensable; i.e., is an injury within the meaning of the act. Thus, an aggravation by effect of the cold in going into a freezing room of an ice cream plant, causing contraction of blood vessels and affecting a pre-existing condition of arteriosclerosis in the leg so as to result in gangrene and subsequent amputation of the leg was held compensable in *Hoage v. Employers Liability Corp.*, 62 U.S. App. D.C. 77, 64 F.2d 715. See also *London Guarantee & Acc. Co. v. Hoage*, 63 U.S. App. D.C. 323, 72 F.2d 191; *Commercial Casualty Ins. Co. v. Hoage*, 64 U.S. App. D.C. 158, 75 F.2d 677.

In *Robinson v. Bradshaw*, 92 U.S. App. D.C. 216, 206 F.2d 435 (cert. denied, 346 U.S. 899, 74 S.Ct. 226) it was held that if an illness which is itself unrelated to the employment is nevertheless aggravated thereby and death results, then the death is the result of an injury within the meaning of the section quoted above.

In the case of *Friend v. Britton*, 95 U.S. App. D.C. 139, 220 F.2d 820 (cert. denied 350 U.S. 836, 76 S.Ct. 72), it was held that an aggravation of a pre-existing aneurysm of abdominal aorta caused by unexpected over-exertion constituted "accidental injury" within the meaning of the foregoing section.

Further, on the subject of liberal construction of pension and retirement laws, see 2 Municipal Corporations, Yokley, para. 357, p. 203, under the heading of "Pensions, rights and restrictions thereon," wherein it is stated:

> "(a) Liberal construction of pension laws. — The courts are in general agreement that pension statutes are to be liberally construed (citing cases). This liberal construction is in favor of the pensioner. (Citing cases) It has also been stated that pension statutes are to be liberally construed with the view to the protection of the pensioner and his family. (Citing cases) Pension laws must be liberally construed to achieve their beneficent purposes." (Citing cases)

As a further indication that an "aggravation" or "acceleration" is equivalent to an "injury" under the pension laws, see 3 McQuillin, Municipal Corporations, para. 12.149, p. 531, wherein it is stated under "Right to Pension-Disability":

> "Although recovery may not be had for incapacity due to disease which did not result from claimant's public service, or for incapacity resulting from a disease contracted prior to entry into municipal service, **acceleration or aggravation of a pre-existing disease is an injury for which a pension is payable.**" (Emphasis supplied)

There is certainly ample basis for finding an "aggravation" in the instant case, based on the record before the Court and also based on *Hyde v. Tobriner, supra*. It is therefore urged, that even prior to the enactment of Public Law 87-857 on October 23, 1962, Title 4-527 should have been interpreted and construed as encompassing cases of "aggravation," such as in the instant case.

## III

## The Court erred in Holding That Title 4-527(2) of the District of Columbia Code, Approved October 23, 1962, Was Not Retroactive to Afford Appellant the Benefits of That Section

Title 4, Section 527(2) of the District Code provides in part as follows: (emphasis supplied)

> "In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, such disability shall be construed to have been incurred in the performance of duty * * *."

The aforesaid section was approved on October 23, 1962, Public Law 87-857. The decision of the appellees denying appellant's appeal was October 18, 1964. Therefore, even assuming arguendo that the foregoing amendment is not retroactive, the Statute would still be applicable at least to any case which had not yet been finally determined, including the instant case in which the appellant was still litigating the type of retirement to which he is entitled.

This Honorable Court in two recent cases has indicated that this amendment is retroactive or at least it applies to any cases that are still in litigation; *Lovell v. Tobriner*, 114 U.S. App. D.C. 65, 310 F.2d 870, and *Hyde v. Tobriner, supra*. The said Statute was enacted and approved while the *Lovell* and *Hyde* cases were before this Honorable Court. The *Hyde* case had already been argued before this Court when said legislation was approved.

In *Lovell v. Tobriner* the opinion of this Court concluded, "New legislation (referring to Public Law 87-857) recently enacted should also be considered if found applicable." In *Hyde v. Tobriner* this Court on November 2, 1962, vacated the judgment of the District Court and remanded with directions that the case be remanded to the Commissioners for reconsideration in light of the new legislation (Public Law 87-857), with opportunity to the parties, of so advised, to adduce additional evidence. This Court in its memorandum opinion stated:

> "It appears that subsequent to the argument of this case on September 18, 1962, the Congress enacted and President approved on October 23, 1962, Public Law 87-857, an Act amending the Policemen and Firemen's Retirement and Disability Act.
>
> "ON CONSIDERATION WHEREOF, IT IS ORDERED by the Court that the judgment of the District Court on appeal herein is vacated and the case is hereby remanded to the District Court with directions to remand the case to the Commissioners of the District of Columbia for reconsideration in the light of the above-mentioned legislation, with opportunity to the parties, if so desired, to adduce additional evidence."

While in the opinion of the appellant his claim should have been granted under Title 4-527(1), appellant contends that Title 4-527(2) also is applicable to his claim. If the position of the appellees is sustained that appellant's illness is caused other than by the performance of duty, the appellant is entitled to the benefits of Title 4-527(2) for the reason that the record indicates appellant's headaches have been aggravated by the performance of duty and that he is permanently disabled to peform his duties as a policeman. An examination of the record and medical reports in this case fails to disclose that the appellees found what caused appellant to have his headaches. Dr. Rizzoli, the neurosurgeon, who also examined the appellant, in his report of December 23, 1959 (Plaintiff's Exhibit No. 1, J.A. 37) states that the appellant denies

any emotional stress or strain "but I have reason to believe he may well have some emotional problems." Appellant at the hearing before the Retirement Board denied any emotional stress. The record is entirely devoid of any diagnosis or other indication that the appellees have found that the appellant's headaches were caused by any disease or injury not in the performance of his duty. As a matter of fact, the record indicates very strongly that the appellant's duties as a policeman aggravated and accelerated his condition. If it can be said that the cause of the appellant's headaches is doubtful, his disability is within the terms of Title 4-527(2) and should have been construed as having been incurred in the performance of duty.

It is therefore respectfully submitted that this Court has at least impliedly ruled that Title 4-527(2), amending Title 4-527(1), is retroactive or that it applies to cases under litigation at time of approval of said amendment to appellant's benefit.

In addition, the legislative history of the said Act imposes upon the appellees the burden of proof that such duty did not aggravate the injury or disease. House of Representatives Report No. 892 states in pertinent part as follows:

> "The purpose of this legislation is to . . . and place the burden of proof on the government that such duty did not aggravate the injury or disease . . ."

The appellees have failed to carry said burden of proof.

## IV.

**Retirement Board and Appellees Imposed an Improper and Unlawful Burden of Proof Upon Appellant by Requiring Him To Show by Substantial Evidence That Appellant's Disability Resulted From Police Duty; That Appellees Failed To Establish by Burden of Proof That Appellant's Disability Arose Other Than in Line of Duty**

The action of the Retirement Board and appellees in imposing an improper burden of proof upon the appellant was arbitrary and not according to the law. The opinion of the Retirement Board is contained in its memorandum to the appellees of September 11, 1962 (Plaintiff's Exhibit No. 2, J.A. 46) which is as follows in pertinent part:

> "A review of the record and the testimony supplied at the hearing failed to show substantial evidence on which the Police and Firemen's Retirement and Relief Board could conclude that Private Blohm's disability resulted from police duty. Accordingly he was retired by unanimous action of the Police and Firemen's Retirement and Relief Board for disability not arising from the performance of duty."

The Retirement Board and appellees apparently take the position that an officer who is faced with retirement for disability which permanently prevents him from performing his duties has the burden of proving by "substantial evidence" that his disability arose out of his performance of duty.

Appellant did not seek to be retired from the police force. He was not the moving party to said retirement.

There is no language in Section 4-527(1) which implies that the appellees and Retirement Board must make a finding based upon substantial evidence that the injury was in line of duty. Rather, reading Title 4-526 together with Title 4-527(1) it was necessary for the Re-

tirement Board and the appellees to make a finding based upon substantial evidence that the disability was **NOT** incurred in the line of duty. The findings, being based upon an improper standard and with no evidence upon which to make such a finding even under such a standard, are arbitrary and capricious on their face.

The burden should be cast upon those who seek to retire appellant for disability not incurred in the line of duty to prove that such injuries were not incurred in line of duty. There is a basic reason for this. Police officers are in a hazardous business. They are exposed to high tension, inclement weather, changes in temperature, exposure to the elements, duty at various times of day or through the night. To place a burden on a police officer or fireman to prove by "substantial evidence" that this condition was caused by his police duty is to place a burden on him which is almost impossible to meet such as in cases of mental disease, headaches, emotional distress, etc. In addition, police officers are usually of limited means, and are not in a position to engage eminent and expensive medical experts to assist in proving their case. In addition, as in this case, the appellant appeared before the Retirement Board without counsel and without legal assistance, because he was lulled into a sense of security in that the appellees' own medical staff gave the opinion that appellant's disability was incurred in line of duty by authorizing excess sick leave and by paying for appellant's medical care, to which he would not have been entitled unless the condition causing the sick leave resulted from performance of his duty.

Under the authorities hereinbefore cited, it is submitted that any doubts on this point should be resolved under the liberal and humane interpretation of the retirement laws in favor of the officer.

Under the amendment to Title 4-527 of the District of Columbia Code, hereinbefore set forth, there is absolutely no question that the burden of proof is on the appellees to prove that such duty did not aggravate the injury or disease.

## V

## Retirement Board and Appellees Ignored Substantial and Pertinent Evidence, Namely, Dr. Harrell's Diagnosis of "Post-Traumatic Headaches"

The Police and Firemen's Retirement and Relief Board owes a duty and obligation to the District of Columbia Government and to any member who appears before said board to hold a fair, thorough and impartial hearing. The proceedings before the Board are required to be reduced to writing and shall show any and all information that may be pertinent to the matter of retirement and relief. Appellant appeared before the Retirement Board without counsel or legal assistance; the Retirement Board and appellees had their attorney present at said hearing and said counsel on behalf of the Board and appellees took active part in the proceedings. Therefore there was an additional duty upon the Board to see that all of appellant's rights were protected, even though appellant had the right to have counsel of his own choice present.

As hereinbefore stated, Dr. Harrell of the Board of Police and Fire Surgeons in March, 1960, diagnosed appellant's illness as "Post-Traumatic Headaches" and treated him for such headaches. The Trial Court held that this diagnosis was before the Retirement Board and appellees, but that even if this matter had not been before that Board and appellees, its absence, the Court concluded, would not have been prejudicial in the light of all the other medical testimony.

An examination of the reported testimony before the Board and Dr. Shapiro's and Dr. Rizzoli's medical reports reveals no mention whatsoever concerning Dr. Harrell's diagnosis. Therefore, it must be conclusively presumed that the Board and the appellees either ignored said diagnosis or failed to consider Dr. Harrell's opinion. Further, Dr. Harrell should have been called to testify before the Board by said Retirement Board. The appellant was not seeking disability retire-

ment. He was ordered to appear before the Board by the appellees for consideration for disability retirement.

*Lovell v. Tobriner, supra*, involved a situation respecting an entry in the appellant's personnel files with regard to a lumbo-sacral strain. Appellant in that case claimed aggravation of a back injury which he received while on duty at a fire. The Board refused to grant retirement under Title 4-527 because it was not satisfied with the proof that said appellant had injured his back, and "especially as there was no record of it in the personnel files of the Fire Department." This Court held in pertinent part as follows (emphasis supplied):

> "Our examination of the record upon which the Retirement Board acted reveals that there was such a personnel record, although **so cryptic in form as to have little meaning until explained** * * *.
>
> "Since it is apparent from the record that what may well be a critical, if not controlling, item of evidence before the Retirement Board was not taken into consideration by that Board in reaching its decision, we remand to the District Court so that the case may in turn be sent back to the District of Columbia Commissioners for reconsideration in light of all the evidence."

## VI

## Appellees' Action in Granting Appellant Excess Sick Leave and Paying His Hospital and Medical Bills Was an Acknowledgment That Appellant's Headaches Were Contracted in Line of Duty

Under Section 9 of Chapter XXXIV of the Police Manual (Br. p. appellant, along with other police officers, was only entitled to 30 days sick leave "**except when the same is in direct consequence of injury received or disease contracted in the actual performance of duty** * * * and then only after the surgeon or surgeons have stated the cause of such absence, certified to its legality, recommended its allowance, **and the same has been approved by the Commissioners.**" (Emphasis supplied)

All of the foregoing requirements were met, including approval by the Chief of Police, and appellant was paid for approximately 30 days excess sick leave. (J.A. 51-55) In addition the appellees authorized payment of appellant's medical bills, all of which would have been improper under D.C. Code Title 4-525 (Br. p. 7-8) and said Police Manual unless the disease was contracted in the "performance of duty." (Br. p. 8)

It is submitted that the foregoing was a definite acknowledgment that appellant's headaches were incurred in the line of duty and is entirely inconsistent with their later order which is here under attack by appellant.

The case of *Graham v. Tobriner, et al.*, Civil Action No. 1291-62, in the District Court is pertinent to the present situation. In that case the plaintiff, a motorcycle policeman, was retired for gout found by the Retirement Board and Commissioners not to have been incurred in the line of duty. Judge Tamm reversed the Commissioners, stating in part: (emphasis supplied)

" * * * In addition to the medical testimony, the records of the Police Department and Police Department Clinic disclose the **plaintiff's ailment was consistently recognized as having been incurred in the line of duty**. In spite of the testimony of Dr. Darrell C. Crain that gout is 'believed to be a hereditary metabolic disease' there is **nothing in the record to indicate that plaintiff's affliction was not the result of the trauma resulting from the constant cranking of his motorcycle.** Therefore, the action of the defendant sustaining the decision of the Police and Firemen's Retirement Relief Board is arbitrary and unspported by the evidence before the Board and before the defendants. In evaluating the evidence comprising the record in this case, the Court is required by the Court of Appeals decision in the case of *Crawford v. McLaughlin, et al.*, 109 U.S. App. D.C. 264, to consider this evidence in the light of the 'humane purpose of such retirement laws.' "

## CONCLUSION

Under all of the circumstances, it is clear that appellant should have been retired for disability in the line of duty, and the Retirement Board, the appellees and the lower Court were in error in finding to the contrary. In addition it is submitted that the new law, Title 4-527(2) is applicable to appellant's claim and should have been so considered by the lower Court and appellees. The record clearly supports and requires a finding that appellant's disability was incurred in the line of duty and he should be retired for disability incurred in the line of duty.

Respectfully submitted,

MAURICE A. GUERVITZ
1010 Vermont Avenue, N. W.
Washington, D. C.
*Attorney for Appellant*

# *INDEX*

[Filed November 20, 1962]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
Civil Division

| | | |
|---|---|---|
| JAMES R. BLOHM, | : | |
| 5702 - 21st Place | : | |
| Hillcrest Heights, Maryland | : | |
| Plaintiff | : | |
| vs. | | |
| WALTER N. TOBRINER | : | |
| F. J. CLARKE | : | Civil No. 3630-62 |
| JOHN B. DUNCAN | : | |
| Board of Commissioners | : | |
| District Building, | : | |
| 14th and E Streets, N.W., | : | |
| Washington, D.C. | : | |
| Defendants | : | |

COMPLAINT FOR MANDATORY INJUNCTION
(Directing Reversal of Order Retiring
Police Officer for Disability Not Incurred
in Performance of Duty, etc.)

The Complaint of the plaintiff herein shows as follows:

1. This Court has jurisdiction of the subject matter herein based on Title 11, Sec. 306, of the District of Columbia Code (1961) and under its general powers and equitable jurisdiction, in that this issue involves an action on the part of the defendants in violation of the rights of the

plaintiff which has caused and if not enjoined, will continue to cause the plaintiff irreparable and incalculable damage.

2. The plaintiff, JAMES R. BLOHM, is an adult citizen of the United States and was a member of the Metropolitan Police Department of the District of Columbia from March 15, 1951, to date of his retirement for disability on April 30, 1962.

3. The defendants, WALTER N. TOBRINER, F. J. CLARKE, and JOHN B. DUNCAN, are all the members of the Board of Commissioners of the District of Columbia and as such, among other things, supervise and control the aforementioned Metropolitan Police Department of the District of Columbia.

4. The plaintiff since, July 1, 1953, served as a member of the motorcycle force of said Police Department continuously until his retirement as aforesaid.

5. Prior to June 20, 1957, the plaintiff was in excellent health and was not suffering from any mental or physical disabilities. On said date, while in the performance of his duties as a motorcycle policeman in attempting to apprehend a traffic violator, the motorcycle which the plaintiff was operating was in collision with an automobile being operated by another person. As the result of said collision, the plaintiff sustained serious and substantial injuries, consisting of broken bones, contusions and a severe cerebral concussion. Plaintiff was hospitalized because of said injuries for a considerable length of time; that he was unconscious when he was taken to said hospital. Because of said injuries, the plaintiff was off duty for a period of about six months.

6. Immediately following said accident, the plaintiff commenced having headaches and same became worse and more frequent as time progressed; that plaintiff suffered great and lasting pain in his head. Plaintiff received treatment at the Police and Firemen's Clinic of the District of Columbia for said headaches and he commenced losing

considerable time from work beginning about January 1960, because of said headaches. Prior to said accident in June 1957, the plaintiff had no history of headaches nor had he ever lost any time from duty because of headaches prior to said accident.

7. On, to-wit, March 14, 1960, Dr. J.B. Harrell, a member of the Board of Police and Fire Surgeons, diagnosed plaintiff's ailment as "Post Traumatic Headaches".

8. Plaintiff avers that said headaches were caused by the aforesaid accident; that the ailment from which he is suffering was the proximate cause of said accident. He further avers that his said ailment has been aggravated by his performance of duty to such an extent that he is permanently disabled from the performance of his duties as a policeman.

9. Plaintiff on or about March 1, 1962, applied for retirement because of injuries incurred while in the performance of his duties, under Title 4, Sec. 527, of the aforesaid District of Columbia code, which provides as follows:

> "Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him from the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service; PROVIDED, that such annuity shall not exceed 70 per centum of his salary at time of retirement; nor shall it be less than 66-2/3 per centum of his basic salary at time of retirement."

10. Plaintiff avers further he is entitled to invoke to his benefit in connection with his claim the provisions of Act of Congress, Public Law 87-857, and he hereby does invoke same to his benefit, which is as follows:

"(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty.********"

11. On April 5, 1962, the plaintiff appeared before the Police and Firemen's Retirement and Relief Board of the Metropolitan Police Department for hearing on his application for retirement as aforesaid. Plaintiff appeared in person and without witnesses or counsel at said hearing; he avers that he was not properly advised by said Hearing Board of his rights to have counsel and witnesses for him at said hearing in accordance with Order No. 53 of the said Metropolitan Police Department. Aside from the plaintiff, the only witness that appeared before said Board at said hearing was one witness for the District of Columbia, Dr. Hyman D. Shapiro, Member, Board of Police and Fire Surgeons.

12. Said Dr. Shapiro testified for the District of Columbia and read into the record his report of March 6, 1962, in which he stated that the plaintiff had been under his observation and care since December 1, 1960; that originally he was sent to him by Dr. Esch, Member of the Board of Police and Fire Surgeons, because of recurrent right frontal headaches which the plaintiff had complained of; that the plaintiff's record indicated that said condition had existed for more than two years at time he saw Dr. Shapiro; that the plaintiff's "present illness started after he was in a collision while on his motorcycle and with an automobile on June 20, 1957."

13. Dr. Shapiro felt the plaintiff's headaches were not the type of headaches that "one sees as a post-traumatic type of headache" but that this did not eliminate the possibility that the ailment of the plain-

tiff was caused by the aforesaid accident. Said doctor's opinion was that the plaintiff's family history and previous history "is negative and noncontributory insofar as his present condition is concerned up to June 20, 1957." He concluded that treatment was to no avail in relieving the plaintiff of his headaches and because of this he was of the opinion that the plaintiff is no longer able to do the work of a policeman and that his condition is a psychophysiologic musculoskeletal reaction, tension headache, of a vascular type. Dr. Shapiro therefore recommended retirement of the plaintiff because of disability.

14. On April 17, 1962, the Police and Firemen's Retirement and Relief Board found that the plaintiff was physically incapacited for further duty by reason of disability not incurred in the performance of duty as a policeman and ordered his retirement for disability as aforesaid, to take effect from and after April 30, 1962. Plaintiff promptly appealed said action of the Board to the defendants in accordance with the procedural rules affecting such appeals. Following hearing of said appeal by said defendants, the defendants on to-wit October 18, 1962, denied the appeal and therefore sustained the action of the said Retirement and Relief Board in ordering the retirement of the plaintiff for disability not incurred in the line of duty from and after April 30,1962.

15. As the result of the defendants' action as aforesaid, the plaintiff has been retired for disability not incurred in the line of duty, as a result of which he receives, in effect, instead of the full amount of retirement to which he is entitled, only forty per cent of his base pay at the time of his retirement, which will be subject to income taxes within a few years and plaintiff has been irreparably damaged thereby. Plaintiff further avers that retirement pay for disability caused in the performance of duty would not be subject to Federal or State income taxes.

16. Defendants had constantly recognized that plaintiff's ailment was caused in line of duty by granting sick leave to the plaintiff in

excess of that regularly allowed to members of the police department; that said action of the defendants in granting said leave was a definite acknowledgment that the plaintiff's ailment was incurred in line of duty and that from the record therefore their later action is entirely inconsistent and arbitrary.

17. Plaintiff has done all that is required by law in order to receive his retirement annuity allocated to policemen who are retired due to disability incurred in the performance of duty, but nevertheless the said annuity to which he is entitled has been denied him and he will continue to suffer this loss throughout the remaining years of his life unless this Honorable Court grants him the relief he seeks. Plaintiff has no other source of relief from defendants' action except by way of appeal to this Honorable Court.

18. Defendants' action in sustaining the decision of the said Retirement Board is therefore completely capricious and arbitrary and is unsupported by the evidence before the said Retirement Relief Board and the defendants, and completely disregards the law in respect to the plaintiff's rights herein.

WHEREFORE, the plaintiff prays:

(1) That subpoenas issue herein to all defendants requiring each to appear and answer the plaintiff's complaint;

(2) That a Mandatory Injunction be issued, pendente lite and permanently, against all the defendants directing them to reverse their order affirming the action of the Police and Firemen's Retirement and Relief Board of the District of Columbia, and directing the defendants to reverse the order of said Retirement Board ordering plaintiff's retirement for injuries not sustained in the line of performance of duty;

(3) That the defendants be directed to order the retirement of the plaintiff for disability incurred in the performance of duty effective as

of April 30, 1962, and further directing the defendants to pay the plaintiff the difference of what he has been ordered to receive since April 30, 1962, and what he should have been paid for retirement for disability incurred in the performance of his duties, in accordance with Title 4, Sec. 527, of the Code of the District of Columbia, at the rate of a minimum of 66-2/3 per cent of the plaintiff's base pay as of April 30, 1962, said money to be paid to plaintiff in a lump-sum.

(4) That the plaintiff's medical records and all other material records and proceedings before the Police and Firemen's Retirement Board and the defendants be made a part of the record of this case.

(5) And for such other further relief as to the Court may seem just and proper.

/s/ James R. Blohm
Plaintiff

/s/ Maurice A. Guervitz
Attorney for Plaintiff

[Jurat dated November 19, 1962]

[Filed December 10, 1962]

## ANSWER OF DEFENDANTS TO COMPLAINT FOR MANDATORY INJUNCTION

### First Defense

The complaint for mandatory injunction fails to state a claim upon which relief can be granted.

### Second Defense

1. Defendants deny that they violated any rights of the plaintiff. They admit that this Court has jurisdiction to determine whether they

had a rational basis for their decision in light of the facts contained in the record made on the administrative hearing afforded to the plaintiff.

2. through 4. The allegations contained in paragraphs numbered 2 through 4 of the complaint are admitted.

Further answering said paragraphs, defendants believe that plaintiff commenced his service on March 16, 1951, and state that plaintiff's assignment on and after July 1, 1953, was that of a motor-cycle officer.

5 and 6. Paragraphs numbered 5 and 6 of the complaint, in the main, are conclusions drawn by the plaintiff from testimony contained in the administrative record. Defendants rely on said record as their answer to the allegations contained in said paragraphs.

7. Defendants are without knowledge or information sufficient to form a belief concerning the allegations contained in paragraph numbered 7 of the complaint. Further answering said paragraph, defendants admit that the quoted words appear on plaintiff's sick card, on the date in question, to the left of the words "Dr. Harrell."

8. Defendants say that they are not required to answer the conclusions contained in paragraph numbered 8 of the complaint. However, if answer be required, said conclusions are denied.

9. For answer to paragraph 9 of the complaint, defendants assume that plaintiff's quote of one section of the retirement law is accurate; however, they rely on the law as it was at the time they acted in plaintiff's case. They are without knowledge or information sufficient to form a belief concerning the allegation that plaintiff applied for retirement on or about March 1, 1962, because of injuries incurred in the performance of duty.

10. Defendants deny that plaintiff is entitled to benefits provided in Public Law 87-857, which was enacted subsequent to the effective date of plaintiff's retirement.

11. For answer to paragraph numbered 11 of the complaint, defendants assert that plaintiff was advised by letter, served upon him on March 26, 1962, that he was entitled to be represented by an attorney and to have witnesses testify at the scheduled hearing on April 5, 1962. Defendants rely on the administrative record for their answer to the remaining allegations contained in said paragraph.

12 and 13. Paragraphs numbered 12 and 13 of the complaint contain the pleader's paraphrasing of portions of testimony contained in the administrative record. Defendants rely on the whole record in support of their decision and as their answer to the allegations contained in these paragraphs.

14. The allegations of paragraph numbered 14 of the complaint, with one exception, are admitted. April 17, 1962, was the date appearing on the letter to plaintiff which notified him of the action taken by the Retirement Board in his case.

15. For answer to paragraph numbered 15 of the complaint, defendants admit that plaintiff has been retired for disability not incurred in the line of duty; deny that plaintiff is being paid less than the amount to which he is entitled; and, state that they are without knowledge or information sufficient to form a belief concerning plaintiff's conclusions which involve Federal or State income taxes.

16. The allegations contained in paragraph numbered 16 of the complaint are denied.

17. The allegations contained in paragraph numbered 17 of the complaint are conclusions of the pleader to which no answer is required, however, if answer be required, said allegations are denied.

18. The allegations contained in paragraph numbered 18 of the complaint are denied.

Further answering the complaint, defendants deny all allega-

tions not specifically admitted or otherwise answered. Further, defendants assert that plaintiff is not entitled to the relief sought, that the above-cause should be dismissed and that costs be assessed against the plaintiff.

/s/ CHESTER H. GRAY
Corporation Counsel, D.C.

/s/ JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

/s/ LYMAN J. UMSTEAD
Assistant Corporation Counsel, D.C.
Attorneys for Defendants

[Certificate of Service]

[Filed Oct. 9, 1964]

MEMORANDUM AND ORDER

This is an action by a member of the Metropolitan Police Department for a mandatory injunction against the Commissioners of the District of Columbia. The plaintiff officer was retired because of disability. Through his counsel, he contends that his retirement should have been for disability occurring in the line of duty. The matter came before the court on the record before the Police and Firemen's Retirement and Relief Board and other exhibits, one of which was the action of the Board of Commissioners on appeal. The case was argued fully by respective counsel, and the entire record has been carefully reviewed and considered by the court.

Plaintiff contends that the action of the District of Columbia Government was arbitrary and capricious, and further, that Title 4, Section 527(2), should have been retroactively applied.

The Board of Police and Fire Surgeons, on March 13, 1962, met and unanimously recommended plaintiff's retirement for disability on

the basis that he had a "psychophysiological musculoskeletal reaction, tension headache". The matter next came before the Police and Firemen's Retirement and Relief Board. That Board held a hearing and thereafter concurred unanimously in recommending the retirement of the plaintiff for disability not incurred in the performance of duty. The matter was appealed to the Board of Commissioners of the District of Columbia. The appeal was presented to the Commissioners, with plaintiff's counsel present, on October 4, 1962, and thereafter was taken under advisement by them. On October 18, 1962, after having reviewed the record, the Commissioners voted to deny the appeal and to sustain the action of the Police and Firemen's Retirement and Relief Board in recommending retirement of plaintiff for disability not incurred in the line of duty.

Another of the contentions of plaintiff is that the record is not clear that the entry, by Dr. Harrell of the Board of Police and Fire Surgeons in March, 1960, that the plaintiff was treated for "post-traumatic" headache was considered. This is based solely on the fact that no specific mention of the entry appears in the reports. The court is constrained to hold that this matter was in fact before the respective bodies which passed judgment as to the disability of the plaintiff. It is, moreover, a part of the official record presented to and received by the court without objection*. Furthermore, Dr. Harrell was a member of the Board of Police and Fire Surgeons which unanimously recommended the retirement of the plaintiff because he had a "psychophysiological musculoskeletal reaction, tension headache." (Incidentally, the only evidence in the case on the point shows that the condition does not result from the type of accident which the plaintiff sustained.) Even if this matter had not been before the Board of Police and Fire Surgeons, the Police and Firemen's Retirement and Relief Board, and the Board

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* See photostatic copy of medical history of plaintiff (P.D. Form 51, page 2.

of Commissioners on appeal, its absence, the court concludes, would not have been prejudicial in the light of all the other medical testimony.

The court finds that the action taken was not arbitrary or capricious but was in fact clearly justified and warranted by the record. The court further holds that Title 4, Section 527(2), is not retroactive. This matter had been disposed of prior to the effective date of the amendment, and the Commissioners were therefore not required to function under such amendment. The Court also finds that the entry by Dr. Harrell was before the various bodies who heard the case.

For the foregoing reasons the complaint for mandatory injunction must be denied. It is therefore, this 9 day of October, 1964,

ORDERED That the complaint be, and the same is hereby, dismissed.

/s/ R. B. Keech
Judge

PLAINTIFF'S EXHIBIT NO. 1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

REPLY TO:
499 PENNSYLVANIA AVE., N.W.
WASHINGTON 1, D.C.

PERSONNEL OFFICE

APR 17 1962

DISABILITY RETIREMENT
(Not Incurred in Line of Duty)

ORDERED:

That James R. Blohm, a Motorcycle Private in the Metropolitan Police Department, having been found physically incapacitated for further duty by reason of disability not incurred in the performance of duty as a policeman, is hereby retired, to take effect from and after April 30, 1962.

That James R. Blohm is hereby directed to reappear before the Board of Police and Fire Surgeons and the Police and Firemen's Retirement and Relief Board within two years from the date of his retirement and within each two succeeding years thereafter until he shall have reached the age of fifty-five.

By order of the Police and Firemen's Retirement and Relief Board:

/s/ VICTOR A. HOWARD
Acting Chairman,
Police and Firemen's Retirement
and Relief Board

N:o
Official copy furnished:
Police (4)
Acct.O.
Disb.O.
Pvt.Blohm,c/o P.D. (mailed 4-17-62, also appeal procedure -igo)
Previous service claimed, but of no benefit.

*Plaintiff's Exhibit No. 1 (Cont'd)*

P.D. 18,4592

2 POLICE & FIREMEN'S RETIREMENT & RELIEF BOARD
April 5, 1962

We, as members of the Police and Firemen's Retirement and Relief Board, concur in recommending the retirement (disability not incurred in the performance of duty) of James R. Blohm, a Motorcycle Private in the Metropolitan Police Department, effective from and after April 30, 1962.

_____
Chief,Administration & Safety Div.

_____
Assistant Corporation Counsel, D.C.

_____
Chief,Special Services Division, D.C.H.D.

_____
Chief Instructor, D.C. Fire Dept.

_____
Deputy Chief of Police, Met.Police Department

O.
cc: Files
Payrolls
Personnel
Cloth. & Equip.

*Plaintiff's Exhibit No. 1 (Cont'd)*

P.D. 18,4592

3

BEFORE THE POLICE & FIREMEN'S
RETIREMENT & RELIEF BOARD

April 5, 1962

IN RE: Disability retirement of Private (Motorcycle) James R. Blohm, T.D., Metropolitan Police Department.

THE BOARD:

Victor A. Howard, Chief, Administration & Safety Division, Acting Chairman.

William F. Patten, Assistant Corporation Counsel, D.C.

Dr. Delbert P. Johnson, Chief, Special Services Division, Bureau of Mental Health, D.C.

John R. Barry, Chief Instructor, D.C. Fire Department.

John E. Winters, Deputy Chief of Police, Met. Police Department.

PRESENT:

Dr. Hyman D. Shapiro, Member, Board of Police & Fire Surgeons.

Private George Whaler, President, Policemen's Association (Present to observe meeting.)

PRIVATE JAMES R. BLOHM

testified under oath as follows:

Mr. Howard: Officer, will you give us your full name and address, please?

Pvt. Blohm: James Russell Blohm, 5702 - 21st Place, S.E., Hillcrest Heights, Maryland.

Mr. Howard: Officer, we have an auditor in this hearing today; do you have any objection to his presence?

Pvt. Blohm: No.

Mr. Howard: At this time do you have your service revolver with you?

*Plaintiff's Exhibit No. 1 (Cont'd)*

Pvt. Blohm: No, I don't.

Mr. Howard: Dr. Shapiro, will you give us the report of the Board of Police and Fire Surgeons relative to Officer Blohm?

DR. HYMAN D. SHAPIRO

testified under oath as follows:

Dr. Shapiro: The Board of Police and Fire Surgeons met on March 13, 1962 and recommended the retirement for disability of Officer James R. Blohm on the basis that he has a psychophysiological musculo-skeletal reaction, tension headache. The disability rateable at 40%.

Mr. Howard: Are there any collateral reports to substantiate that, Dr. Shapiro? Will you give us those?

Dr. Shapiro: Under date of March 6, 1962, I forwarded the following recommendation to the Board of Police and Fire Surgeons, and you've heard their action. At this time I stated that, "Private Blohm had been under my observation and care since December 1, 1960. Originally he was sent to me by Dr. Esch because of recurrent right frontal headaches which he stated was of one year's duration. According to our Clinic files he was seen for this condition by Dr. Rizzoli (a neurosurgeon) on December 23, 1959, and at that time gave a history of right frontal headaches for the past year and a half, so his condition now goes back to more than two years.

"His past history is non-contributory except that his father died in 1948 at the age of sixty-six of a cancer of the head. This officer was twenty years of age at the time and when his headaches first started he had a fear that he also had cancer of the head, but this was dissipated when Dr. Rizzoli definitely told him he did not have it. The rest of the family and previous history is negative and non-contributory insofar as his present condition is concerned up to June 20, 1957. (There were some other illnesses which I will cover later, but which were not pertinent to his present complaints and the condition he's being retired for.)

*Plaintiff's Exhibit No. 1 (Cont'd)*

'His present illness, he states, started after he was in a collision while on his motorcycle and with an automobile on June 20, 1957. He was hospitalized for this at Casualty Hospital on that date. He was stated to be unconscious at the time. He was seen at the time by Dr. Norman Horwitz, a Neurosurgeon, who felt he had a possible fracture of the skull, but this was later eliminated and he was treated for a cerebral concussion. The symptoms of this cleared up quickly, except that he did have some orthopedic complications from broken bones elsewhere, for which he received treatment for a considerable period of time, so he had to be off duty until December of 1957. (That's six months that he was off duty.) According to the history given by Dr. Rizzoli his headaches started in the summer of 1958, which would be a year after the injury. He says they were located on the right side of the head. I note, however, that there was a similar history of headaches that followed his injury previously in June of 1957, so actually it started in June of '57 rather than in the summer of 1958. The man denied any emotional stresses at the time but Dr. Rizzoli felt that, 'He may well have some emotional problems.' Following this the man had an episode some time after the injury of June 20, 1957, when he passed out, completely unconscious, in the bathroom. After this Dr. Rizzoli worked him up again with skull x-rays and EEGs, and all the findings were negative and he felt that the man had a tension or an allergic type of headache and he felt that no further studies were indicated. However, when he continued to have his headaches he was admitted to the NIH for a brain scan in March of 1960. (That is a test where they use radioactive material and then take tests to see if it's located at the atomic or--the material is located in the head, like you use a geiger counter.) Negative findings resulted. Following this Dr. Rizzoli felt that he had a vascular type of headache, either due to tension or allergic phenomenon, and he requested that he have histamine desensitization. This was done in the Clinic by Dr. House, but this did not help. When the headaches

*Plaintiff's Exhibit No. 1 (Cont'd)*

persisted, Dr. Rizzoli then did an arteriogram at the Washington Hospital Center on May 25, 1960. (That's a test where you inject a fluid into the artery in the neck and then you snap pictures of the arteries and vein-filling to see if there's any involvement of the blood vessel or the brain itself.) This was negative. So were the spinal fluid, (and incidentally, he also had a pneumoencephalogram, which is air studies of the brain -- all these tests were negative.) Dr. Rizzoli therefore concluded that he had a vascular type of headache and put him on an Ergotamine type of medication, and prescriptions with Codeine by the doctors at the clinic, which gave him only temporary relief.

"The man continued to have his headaches, occurring one or two times a week. He has rarely gone as much as two weeks without them. Often no medication will relieve the condition. He fears to exert himself because of these headaches, feeling it will bring on another headache. The day after his headache he feels a little weak.

"At the time I saw him on December 1, 1960, I felt that this was not the type of headache that one sees as a post-traumatic type of headache. However, this did not eliminate the possibility. My opinion was that he had a vascular or tension type of headache, so I put him on Caffergot-P-B to be used prophylactically and with his attacks. I continued to see him, saw him on December 13 and December 20, 1960. There was no improvement with this medication. The man kept insisting that there was something radically wrong with him that was causing his headaches; the pains would get terrible and violent at times that he felt like his head was in a vise and someone was turning the handle. In view of the fact that Dr. Rizzoli had previously suggested that if he did not respond to treatment he should have a blocking of the supraorbital nerve on the right side. This was done in mid February, 1962. The man did not respond to this nerve block and continued with his headache as bad as ever. He was off duty for two weeks when I last saw him, doing only one day's duty on February 21st; his headaches built up so

*Plaintiff's Exhibit No. 1 (Cont'd)*

bad he had to go off duty again. This man feels he cannot do duty if his
6 headaches continue this way. Consultation with Dr. Esch revealed that this man had followed a similar course over the past two or three years while he was treating him, with frequent visits with complaints of headaches and having to go off duty because of same.

"I concluded, therefore,that the man has had intensive treatment for his headaches over a period of three years. Treatment has been no avail in relieving him. Because of this I am of the opinion that Private Blohm is no longer able to do the work of a policeman and that his condition is a psychophysiological musculoskeletal reaction, tension headache, of a vascular type.

"I therefore recommend that Private Blohm appear before the Retirement and Relief Board for consideration of his retirement. The disability rating is 40%.

Mr. Howard: And I gather then there is no subjective medical findings of a post-traumatic nature there?

Dr. Shapiro: Subjective, yes; in that the man alleged that the onset of his headaches--

Mr. Howard: No, I mean objective.

Dr. Shapiro: Objective--

Mr. Howard: I'm sorry, I mean objective.

Dr. Shapiro: This man has had very intensive treatment; he's had EEGs brain waves, he's had arteriograms, he's had a pneumoencephalogram, he's had nerve blocks; and neurologic examination didn't reveal anything, so both Dr. Rizzoli and I feel that we cannot relate these headaches to the injury.

Mr. Howard: I see.

Dr. Shapiro: Although, as I said, no one can absolutely do this, but on a basis of all of the medical data it is impossible to show that this is a result of same.

Mr. Howard: Now, were x-rays taken of the cervical and lumbar spines?

*Plaintiff's Exhibit No. 1 (Cont'd)*

Dr. Shapiro: Yes sir, I'll go into this in more detail, yes. This man has had a number of injuries, quite major. On December 16, 1955, he was hospitalized at the Emergency Hospital for sprained left ankle, contused left knee, multiple contusions of the body; and returned to duty December 31st, and he had slight symptoms after that. There was some pending litigation settled out of court for $1700. He was next hospitalized 2-3-57 to 2-9-57 when thrown off a motorcycle, when the man had contusions and strain of his right arm, left knee and right foot. He was off duty from three weeks to a month and this cleared up. Here is another accident on 6-20-57 after he was in a collision with a motor-
7 cycle and an auto and hospitalized at Casualty Hospital 6-20-57--that's the injury, the last injury. He was unconscious when seen at the hospital and at that time a possible basal skull fracture was suspected but x-rays and other findings did not show this. So he has had x-rays of his skull. He had some fractures of his right upper extremity and left shoulder and he was under the care of Dr. Berg, an orthopedic surgeon, so if there was any involvement of his vertebrae that would come within Dr. Berg's scope, but he didn't report any--I do not have the full Clinic records here. At that time he was off duty until December '57, his shoulder was stiff for a few weeks, hurts him only in cold weather. He states he had no residual headaches from the time of the injury until the time he returned to duty, so there was no continuity according to the history. And this case was settled out of court for $7000; so as far as I know there has been nothing to indicate that these headaches are the result of any surgical condition or any orthopedic condition or anything outside of the nervous system.

Mr. Howard: These collateral injuries that have been sustained at various times are not a disabling situation?

Dr. Shapiro: Apparently left no residuals according to our Clinic files, what the man has told; but I thought this should be a matter of record because these were major injuries that he incurred while on duty.

*Plaintiff's Exhibit No. 1 (Cont'd)*

Mr. Howard: Certainly like to have them. Is there anything else of a collateral, corroborative nature, doctor?

Dr. Shapiro: I'm just looking through my records here, let me see. I have all of the various neurosurgical consultations done by the outside physicians, and let's see what they show. Neurosurgical consultation by Dr. Rizzoli December 23, 1959, shows a transverse scar across the right frontal region due to an old injury -- he doesn't remember the details of it; no abnormality of the skull, he does not report anything in the neck and he says he's asked him to have x-rays of his skull and EEG's. Further report by Dr. Rizzoli March 1, 1960, shows that he was in the Washington Hospital Center, EEG's and skull x-ray were taken, and they were negative. No neurologic deficit. There is reports from the NIH March 18, 1960, of a normal brain scan, radioactive scan was done on March 15, 1960. Further consultation by Dr. Rizzoli March 22, 1960, just the complaints of headaches and the request for desensitization by histamine. At the time he did not feel that arteriography and pneumoencephalography were indicated. However, when this continued he saw him again on May 17, 1960 and felt that he should have the arteriogram and pneumoencephalogram. And his last consultation report, June 14, 1960 shows an arteriogram was done on May 25, 1960, which was normal; followed by a pneumoencephalogram two days later, May 27, 1960, which was also normal; spinal fluids were normal. And that was all, there is no reference in any of these to any neck or spine complaints, and he gave me none.

Mr. Howard: Thank you, doctor. Any questions of Dr. Shapiro, gentlemen?

8 Dr. Johnson: Did the NIH offer a diagnosis?

Dr. Shapiro: They offered no diagnosis at all, just sent that brain scan--they do that for those of us who do neurology and neuropsychiatry without charge to these people, and they're about the only place we can get a good test of that type; the hospitals here, outside of that, are not equipped for it.

*Plaintiff's Exhibit No. 1 (Cont'd)*

Dr. Johnson: It comes out with no findings?

Dr. Shapiro: No findings. We've had a number of people -- I've had one man that had been an epileptic, so-called, for seven or eight years before I joined the Department, and I suspected the man had a tumor and my neurological examination and the brain scan picked it up and he was operated on. He appeared before this Board, if you remember, and retired.

Dr. Johnson: Also, I'm still not clear about the date of the onset of the headaches correlated with the date of the accident in which there was a head injury--

Dr. Shapiro: Well, that was given differently. When he saw Dr. Rizzoli--I mean, he told me his headaches cleared up by December--I mean, he had no headaches in December; later he gave a history to Dr. Rizzoli that the headaches started a year after the accident; he told me, however, later that the headaches followed the accident and continued; but I am just reading these reports.

Dr. Johnson: As far as you know there has been no history of headaches prior to the injury, head injury?

Dr. Shapiro: None.

Dr. Johnson: I'd like to ask--the period he was unconscious--the injury--the length of time he was unconscious, is that known?

Dr. Shapiro: Let's see if I have that recorded here. Dr. Horwitz's report merely stated there was a period of unconsciousness; I did not check back into the records, but Dr. Horwitz was an associate of Dr. Rizzoli's and I imagine if it was any prolonged thing indicating some brain trauma they would have commented on it. He was unconscious when admitted to the hospital and quite properly was thought to have a basalar fracture of the skull, but they later eliminated that possibility so he could not have been unconscious too long. The man, of course, here can tell us. I remember asking him, and if I made no comment it could not have been for any prolonged period.

*Plaintiff's Exhibit No. 1 (Cont'd)*

Mr. Patten: Dr. Shapiro, as I understand it, then, your diagnostic tests were negative, is that correct?

Dr. Shapiro: That's correct, the neurologic and lab--all known lab procedures were negative.

9 Mr. Patten: And the degree of disability is what, doctor?

Dr. Shapiro: 40%.

Mr. Patten: 40% in this case? The headache symptoms, are those subjective?

Dr. Shapiro: Yes, they are subjective.

**PRIVATE BLOHM**

Mr. Howard: Officer Blohm, are you married?

Pvt. Blohm: Yes sir.

Mr. Howard: And what is your wife's name?

Pvt. Blohm: Janice Virginia.

Mr. Howard: Is this the first and only marriage for both you and Mrs. Blohm?

Pvt. Blohm: Yes sir.

Mr. Howard: Neither were ever previously married?

Pvt. Blohm: No sir.

Mr. Howard: Are there any children of the marriage?

Pvt. Blohm: Two.

Mr. Howard: Will you give us their names and dates of birth, please?

Pvt. Blohm: John, born May 22, 1948, and Nancy, born November 13, 1953.

Mr. Howard: That constitutes your family?

Pvt. Blohm: Yes sir.

Mr. Howard: Our record shows that you were born September 15, 1927--

Pvt. Blohm: That's correct.

*Plaintiff's Exhibit No. 1 (Cont'd)*

Mr. Howard: Appointed to the Police Force March 16, 1951, and have served continuously since that time.

Pvt. Blohm: That's right.

Mr. Howard: Also shows that you had service with the United States Navy from February 10, 1945 to July 11, 1946.

Pvt. Blohm: That's correct.

Mr. Howard: And that was an honorable discharge?

Pvt. Blohm: Right.

Mr. Howard: What was that, serving your military service under induction, or did you enlist?

Pvt. Blohm: I enlisted.

Dr. Shapiro: He was 17 years of age and he voluntarily enlisted.

Mr. Howard: And that accounts for the fact that you only served one year?

Pvt. Blohm: Well, it was something over--a year and a half--during the war.

Mr. Howard: I see. What was your rating in the Navy?

Pvt. Blohm: Fireman First Class.

Mr. Howard: Alright. Did you have any other Federal or District Government Service between the time of your discharge from the Navy and your appointment?

Pvt. Blohm: No sir.

Mr. Howard: While a police officer and on your off duty time, did you have any employment in any capacity for hire?

Pvt. Blohm: Have I had?

Mr. Howard: Yes.

Pvt. Blohm: Yes sir, some.

Mr. Howard: What were those jobs?

Pvt. Blohm: Painting.

Mr. Howard: While so engaged, did you ever receive any injuries or contract a disease for which you required medical treatment or hospitalization?

*Plaintiff's Exhibit No. 1 (Cont'd)*

11 Pvt. Blohm: No sir.

Mr. Howard: Again, during your period as a police officer but on your off-duty time, were you ever involved in an accident or sustained any injury or contract a disease that required medical treatment or hospitalization?

Pvt. Blohm: Off duty, no.

Mr. Howard: Alright, now, as to the time you were on duty, will you tell us what injuries or diseases you sustained or contracted that required medical treatment or hospitalization?

Pvt. Blohm: Well, in June of 1957, I had a head injury and several broken bones, contusions and so forth. I never had any headaches before that accident, and they weren't bad afterwards until I'd say about a year; and they grew worse.

Mr. Howard: Just what happened at this accident, give us a brief resume of the details of what happened?

Pvt. Blohm: I was chasing a speeding car--

Mr. Howard: On a motorcycle?

Pvt. Blohm: On a motorcycle. Seven o'clock in the morning--had the red lights on and the sirens, because the man went through a red light and he was driving in an extremely dangerous manner--he passed me originally.

Mr. Howard: Now where was this?

Pvt. Blohm: On Pennsylvania Avenue, S.E.; I guess it began around 11th Street, and as we approached 8th and Pennsylvania, S.E., the light was red, the man proceeded on through at a high rate of speed, and I had the red lights on and the siren and everybody heard it except one man, he was apparently deaf, wearing a hearing aid--didn't hear the siren and I didn't see him, and we approached the intersection and of course, he pulled--I don't know whether he hit me or I hit him, I don't remember--don't remember anything until the next day.

Mr. Howard: When you first became conscious I assume you were in the hospital?

*Plaintiff's Exhibit No. 1 (Cont'd)*

Pvt. Blohm: Casualty Hospital, yes sir. And they asked me what happened and I couldn't tell them--I didn't--I never felt the man hit me and I never--

Dr. Shapiro: Might state that that's a common thing, amnesia after a severe concussion.

Pvt. Blohm: Never saw him at all. He stated, of course, that he pulled out in the intersection and the light was green--he didn't hear the siren. There was several witnesses, of course, you know, were there and said they all heard it, but the man, like I say, was wearing a hearing aid and I guess that's why he didn't.

Mr. Howard: Now is that the incident that you attribute the onset of these headaches to?

Pvt. Blohm: Yes sir.

Mr. Howard: Is also that the incident where a settlement was effectuated?

Pvt. Blohm: Yes sir.

Mr. Howard: Alright. Now, did you have any other injuries or contract any diseases during your service as a police officer?

Pvt. Blohm: None other than minor things, but nothing major.

Mr. Howard: In other words, even though you probably had other situations which required medical treatment and hospitalization, you do not tie those in to the condition that brings you before this Board?

Pvt. Blohm: No sir, just that one head injury is the only thing that I think caused my condition.

Mr. Howard: I see. Officer, are you familiar with the provisions of law that permits you to accept a reduced pension, the difference of which would be added to the pension your wife would receive, or a designated minor child, if they survived you?

Pvt. Blohm: No sir.

Mr. Howard: Alright. Under this retirement law you can, if you wish, take a reduced pension by 10%, which would be set aside and in

*Plaintiff's Exhibit No. 1 (Cont'd)*

the event that you designated your wife or one of your minor children to have their pension increased by the amount that had been withheld from yours, you can do so. No obligation on you, it's a choice that you can make yourself. Do you understand what I'm driving at?

Pvt. Blohm: Yes sir.

Mr. Howard: What is your wish?

Pvt. Blohm: I don't think I'd care for that.

Mr. Howard: You want the full pension?

Pvt. Blohm: Yes sir.

Mr. Howard: Alright. Dr. Johnson, do you have any questions of Officer Blohm?

13 Dr. Johnson: How long do your headaches last?

Pvt. Blohm: Doctor, they're--in the last three, four months it's been almost constantly. Up until then it was--all the time I was working it was once, twice a week, or sometimes I'd go two weeks' but the last two or three months, almost constantly. Only relief I can get is to take medication, codeine, and go to bed.

Dr. Johnson: Where do you feel it?

Pvt. Blohm: Right here (indicating forehead); right above my eyes.

Mr. Howard: For the record, Officer Blohm placed his hand on his right forehead in response to Dr. John's question.

Dr. Shapiro: May I add, Dr. Johnson, when he was last referred to me by Dr. Esch, February 26, 1962, he was complaining of "needle" sensations in his head; so you can see why we made the diagnosis; I mean, it was that varied type of symptomatology.

Dr. Johnson: And what--you say that within the last month they've been almost continuous?

Pvt. Blohm: Well, last almost two months, now.

Dr. Johnson: Does it vary, I mean--I mean does it feel the same all the time, or is it a little less at times, or--

Pvt. Blohm: Well, when they start to come on they're--you know,

*Plaintiff's Exhibit No. 1 (Cont'd)*

not as bad, but as the day grows on and if I don't go to bed and take codeine it gets to the stage where I just have to go to bed--they'll close my eyes up.

Dr. Johnson: Well, is there anything else besides what Dr.Shapiro has said as to what you feel?

Pvt. Blohm: No, doctor, other than--I understood the doctor to say that possibly this accident could cause my disability or it couldn't; of course, I feel like it has--

Dr. Johnson: Well, I'm not asking that, I'm asking as to what you feel in your head. He said that you--in your history you have said that you feel something like sticking or pricking, like needles; is there anything else that [you] noticed about that?

Pvt. Blohm: No sir, just this terrific pain.

Mr. Howard: Chief, do you have any questions?

Deputy Chief Winters: No questions, Vic.

Mr. Howard: Chief Barry?

14 Chief Barry: Do you want to retire?

Pvt. Blohm: Chief, no sir, I don't; but under the circumstances I feel like--

Chief Barry: You don't want to?

Pvt. Blohm: No sir. I'd like to go on.

Mr. Howard: Officer, have you ever been in difficulty with your superiors or associates at any time during your service on the Force?

Pvt. Blohm: No sir. Never.

Mr. Howard: Do you have any questions, Mr. Patten?

Mr. Patten: Yes, I do. Have you ever told any of your examining physicians that the headaches did not commence following this accident?

Pvt. Blohm: Did not? You mean--

Mr. Patten: That's right.

Pvt. Blohm: I've had them since the accident.

Mr. Patten: Yes, but did you ever tell--did you--have you--well, did you ever tell them anything other than that?

*Plaintiff's Exhibit No. 1 (Cont'd)*

Pvt. Blohm: No sir.

Mr. Patten: And have they been continuous since the accident?

Pvt. Blohm: Oh, no, they haven't been continous; I'd say about a year they--you know--begin to get bad and I started complaining about them--and I started complaining about them about a year afterwards.

Mr. Patten: So they started to get bad about a year after the accident? Is that right?

Pvt. Blohm: That's right.

Mr. Patten: Now, what do you mean by getting bad?

Pvt. Blohm: Well, just bad pains, it's a terrific pain and it was coming--you know--often enough that it was forcing me to go on sick leave and go to the doctor. One time I did have them that I had that passing out spell--you know--my head was aching.

Mr. Patten: Now, I believe you said that the accident happened in June of '57?

Pvt. Blohm: That's correct.

Mr. Patten: So then these headaches became more severe commencing at approximately June of '58. Is that right?

Pvt. Blohm: About then, yes sir.

Mr. Patten: And it was at this time or shortly thereafter that you had to take sick leave periodically as a result of these headaches?

Pvt. Blohm: I believe so, yes sir.

Mr. Patten: And was it during this time also, that you were being treated by the Board of Surgeons for this condition?

Pvt. Blohm: Yes sir.

Mr. Patten: So you reported to the Board of Surgeons that you were having these severe headaches, is that right?

Pvt. Blohm: Yes sir.

Mr. Patten: Do you have any idea as to how many days sick leave you took as a result of this condition?

*Plaintiff's Exhibit No. 1 (Cont'd)*

Pvt. Blohm: No sir.

Mr. Patten: Any approximate estimation? Anything at all that the Board could use?

Pvt. Blohm: Just for the headaches?

Mr. Patten: Yes.

Pvt. Blohm: I would say, in the last three or four years probably five or six months. At first I was working with them and taking medication; and then one of the doctors at the clinic--I don't remember whether it was--I think it was before Dr. Esch--it was Dr. Harrell, sent me to Dr. Rizzoli with them. I think then when I went--you know, began to get sick with them; but up until that time I was working with them.

Mr. Patten: Are you having any difficulty at home?

Pvt. Blohm: No sir.

Mr. Patten: Are you having any financial difficulty?

Pvt. Blohm: No sir.

16 Mr. Patten: Are you able to give the Board any other reason which you might have for these headaches?

Pvt. Blohm: No sir.

Mr. Patten: You were having no difficulty on your job?

Pvt. Blohm: No sir, none at all. Had the best job down there.

Mr. Patten: I notice here on reviewing your sick card that the--your first entry for headache is--appears to be in 1960; January 14, 1960--

Dr. Shapiro: He lost 16 days for headaches. I might state for the members of the Board who are not familiar with this, if a man reports for treatment for headaches--comes to the clinic--and he loses no time it will not be recorded here (indicating master sick card), but this is when he starts losing time. And that was another thing, there was an absence of any record from the time of the injury until his history of 1958 or when he actually went under Dr. Rizzoli's care; but he actually

*Plaintiff's Exhibit No. 1 (Cont'd)*

was having headaches, you will note, when Dr. Rizzoli saw him December 23, 1959. But when he first started to lose time from [work] it was in 1960, January.

Pvt. Blohm: I was just going up and getting prescriptions from the clinic and continuing to work.

Dr. Shapiro: Only way you could check that would be through the clinic day book that's kept.

Mr. Patten: Well, were you taking sick leave as a result of this condition?

Pvt. Blohm: Not until I went to Dr. Rizzoli up at--on Connecticut Avenue.

Dr. Shapiro: December of 1959.

Pvt. Blohm: December of 1959.

Mr. Patten: I just want to get it clear. From the time of this accident until December of '59 you didn't take sick leave for these headaches, did you?

Pvt. Blohm: I don't recall whether it was on sick leave or not.

Dr. Shapiro: I may say that the record shows that he lost three days from June 29th to July 2nd for torticollis, which is a wry or stiff neck--that is not necessarily headache but I think the Board should know about it especially in view of the doctor asking me about--the Chairman--asked me about his spine or anything.

17 Mr. Patten: You mentioned that--I believe in answer to one of Mr. Howard's questions--that you received a settlement as a result of the injury that you sustained in June of 1957. Is that correct?

Pvt. Blohm: That's right.

Mr. Patten: Now, did you have to file a case and go into court?

Pvt. Blohm: No sir.

Mr. Patten: Were you represented by an attorney?

Pvt. Blohm: Yes sir.

Mr. Patten: Who was the attorney?

*Plaintiff's Exhibit No. 1 (Cont'd)*

Pvt. Blohm: Guervitz.

Mr. Patten: Who?

Pvt. Blohm: Guervitz.

Mr. Patten: Guervitz represented you. No law suit was filed?

Pvt. Blohm: Well, it was filed but it didn't go to court.

Mr. Patten: It did not go to court?

Pvt. Blohm: No sir.

Mr. Patten: Do you recall when the law suit was filed? And where it was filed?

Pvt. Blohm: No sir, I don't off hand; I can't even tell you when it was settled.

Mr. Patten: Well, could you tell me this; was it settled before you went to see Dr. Horwitz--Dr. Rizzoli?

Pvt. Blohm: Settled before? Yes sir.

Mr. Patten: It was settled before you went to see Dr. Rizzoli?

Pvt. Blohm: Yes sir.

Mr. Patten: And do you know what damages were alleged in that complaint as a result of this accident?

Pvt. Blohm: No sir.

18 Mr. Patten: Did you have a private physician as a result of that accident?

Pvt. Blohm: No sir. Just what the clinic supplied.

Mr. Patten: Just what the clinic supplied.

Pvt. Blohm: They were outside doctors, but--

Dr. Shapiro: You mean Dr. Horwitz or Dr. Berg -- yes, well I've already mentioned--that was for orthopedic conditions, he had some fractures; but according to our clinic records there was nothing furnished the attorneys prior to that time for any head condition.

Mr. Patten: But in any event you think this matter was settled before you went to see Dr. Rizzoli?

Pvt. Blohm: Yes sir.

*Plaintiff's Exhibit No. 1 (Cont'd)*

Mr. Howard: Any further questions of Officer Blohm?

(No questions.)

Mr. Howard: Anything you'd like to bring out, Officer, that you feel is pertinent and germane and that we have not covered?

Pvt. Blohm: No, I think that takes care of it. Like I said, I never had any headaches before I had this head injury, and I don't see where anything else would cause it. That's all.

Mr. Howard: You had no injuries or no such problems while you were in the Navy?

Pvt. Blohm: In the Navy? No sir, no injuries; and I would say no problems--I was single, and no problems.

Mr. Howard: OK, well, if you have nothing further then, that will be all and we'll take it under consideration.

Pvt. Blohm: Thank you, gentlemen. Thank you very much.

(Witness excused)

*Plaintiff's Exhibit No. 1 (Cont'd)*

19

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department
Washington, D.C.

BOARD OF POLICE AND FIRE SURGEONS

MEDICAL SURVEY REPORT ON: James R. Blohm

Date of Birth September 15, 1927 Date Appointed March 16, 1951

Age Last Birthday 34 Present Assignment Private, T.D.

General *OK*

Mentality *Psychological musculoskeletal reaction, tension headache*

Weight 188 Height 72"

Ishihara *OK* Vision *R* 20/20 *L* 20/30

Hearing *OK* Heart *OK*

Teeth *OK* Tonsils *OK*

Kidneys — Skin *OK*

Wassermann — Blood Pressure 140/84

Digestion *OK*

Organs of Respiration *OK*

Muscles and Articulations *OK*

FINDINGS AND RECOMMENDATIONS *RETIREMENT - DISABILITY*

Respectfully submitted,

BOARD OF POLICE AND FIRE SURGEONS

40%

By *B. F. Dean, Jr.*
Secretary

March 13, 1962

*Plaintiff's Exhibit No. 1 (Cont'd)*

SUPPLEMENTARY NEUROSURGICAL REPORT

20 BLOHM, Mr. James R. 13 February 1962

This patient apparently has continued to have headaches since I last saw him a year and a half ago and he states they have been especially severe in the last few months. He has been unable to work for the last two weeks and he states that he has had continuous pain in the right supraorbital region. He apparently takes Codeine and many other medications.

On examination the neurological examination remains essentially negative.

It is again my impression that these are vascular type headaches, possibly on a tension basis. I have asked the patient to try Dilantin, 1/10 gram t.i.d. to see whether this medication is of help in preventing the headaches. Also, arrangements are being made for this patient to have a supraorbital nerve block on 14 February. Should he be free of pain on this day, the nerve block will be postponed until he is having a headache.

/s/ Hugo V. Rizzoli, M.D.
HUGO V. RIZZOLI, M.D.

21 SUPPLEMENTAL NEUROSURGICAL REPORT

BLOHM, Mr. James R. 1 March 1960

Following my initial consultation on this patient, I again saw him on 26 January 1960 at which time he stated the Phenergan was of no help. The electroencephalogram and the skull x-rays taken at the Washington Hospital Center were negative. He was placed on Teldrin Spansules, 8 mgs, b.i.d. and Sparine. He took these medications until the prescriptions ran out but he did not feel there was any real improve-

*Plaintiff's Exhibit No. 1 (Cont'd)*

ment. In the meantime, he has continued to have headaches which are rather severe in the right frontal region. They are sharp in character and not of the throbbing variety. The last headache occurred two days ago while he was at home working in his basement, when he developed a sudden episode of pain which persisted until the following morning.

Examination today reveals no neurological deficit.

It is still my opinion this is a vascular type headache, either induced by tension or some allergic phenomenon.

I would suggest he be tried on histamine desensitization. Possibly this could be carried out at the Police and Fire Clinic. At the same time, I would like to arrange for him to have brain scan at the NIH. There is no expense involved in this test; however, it would require the patient being hospitalized and off duty for two days.

/s/ Hugo V. Rizzoli, M.D.
HUGO V. RIZZOLI, M. D.

22 NEUROSURGICAL CONSULTATION

BLOHM, Mr. James R. 23 December 1959

CHIEF COMPLAINT: Headaches.

HISTORY: This thirty-two year old motorcycle policeman states he has had right frontal headaches for the past year and a half. He indicates these headaches are localized in a small area in the right side of the forehead. They are not throbbing. He has difficulty describing them and calls them a "dead headache" of great severity. They disappear after taking medication or on going to bed. They are apt to occur around two-thirty in the afternoon and do not seem related to whether or not he has lunch. Occasionally he awakens with them in the morning. They have occurred as often as two or three times weekly and as

*Plaintiff's Exhibit No. 1 (Cont'd)*

seldom as once a month. His history indicates he was treated for a cerebral concussion at Casualty and Emergency Hospitals in June 1957 following a motorcycle accident, at which time he also sustained some fractures. He further indicates that the symptoms referable to his head following that accident cleared up after a few months. He denies any emotional stress or strain, but I have reason to believe he may well have some emotional problems. There is no history of double vision, motor weakness or sensory loss. Apparently he had a brief unconscious episode two years ago while in a bathroom. Although he is unable to tell me whether there were any definite convulsive movements accompanying this, there apparently was no associated sphincter incontinence or biting of the tongue.

PHYSICAL EXAMINATION:

General: The patient is a tall, well developed man who does not appear acutely ill. Blood pressure is 135/80; pulse is 90.

Head: There is a transverse scar across the right frontal region which he states is due to an old injury and he does not remember the details of this accident. There is no definite tenderness or abnormality of the skull contour in this area.

Cranial Nerves: The cranial nerves are intact.

Motor: There is normal muscle tone; no motor weakness or paralysis; no atrophy or fibrillation.

Sensory: All modalities of deep and superficial sensation are intact.

Reflexes: All deep and superficial reflexes are present and equal bilaterally; there are no pathological reflexes.

Cerebral and Cerebellar: There are no cerebral or cerebellar defects.

23 IMPRESSION: There is no evidence of increased intracranial pressure and I do not believe his headaches are due to a space-taking lesion or to a subdural hematoma. I feel it is more likely that his headaches are on a tension or allergic basis.

*Plaintiff's Exhibit No. 1 (Cont'd)*

RECOMMENDATIONS: I have asked him to have x-rays of the skull, an electroencephalogram and to try Phenergan, 25 mgs, t.i.d.

/s/ Hugo V. Rizzoli, M.D.
HUGO V. RIZZOLI, M.D.

24 SUPPLEMENTARY NEUROSURGICAL REPORT

BLOHM, Mr. James R. 22 March 1960

This patient has been to the National Institutes of Health. His work-up there, including a brain scan, was found to be entirely negative. He had two episodes of headache: one last night and one five nights ago. They all tend to disappear when he falls asleep and he apparently has no difficulty sleeping after taking some pills.

The physical examination remains unchanged.

It is still my impression that this is a vascular type headache on a tension or allergic basis. I have asked him to get an Ergotamine Medihaler to try when his headache first comes on. I have also given him a prescription for Fiorinal tablets to take during periods when headache persists. I further recommend that he get histamine desensitization, and perhaps Dr. House would be able to arrange for this at the Police and Fire Clinic. I do not feel that arteriography or pneumoencephalography are indicated at this time. I can see no reason why this patient cannot return to duty.

/s/ Hugo V. Rizzoli, M.D.
HUGO V. RIZZOLI, M. D.

*Plaintiff's Exhibit No. 1 (Cont'd)*

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department

March 22, 1962

TO: The Chief of Police

THRU: The Deputy Chief, Executive Officer

SUBJECT: Recommended disability retirement of Private James R. Blohm, Traffic Division

The Board of Police and Fire Surgeons has recommended the disability retirement of Private James R. Blohm, Traffic Division. You are requested to direct Private Blohm to appear before the Police and Firemen's Retirement and Relief Board at 1:30 P.M. on Thursday, April 5, 1962, in Room 5114, Municipal Center Building.

Private Blohm may be expected to demonstrate a connection between his official police duties and the disability which incapacitates him for further duty. In this regard, he may submit any available supporting documents (injury reports, statements of fellow officers, etc.) and/or testimony of witnesses who have knowledge of the cause of his disability. He may be represented at this hearing by an attorney or other person of his own choosing, if he so desires.

The report of the Board of Police and Fire Surgeons and Private Blohm's personnel file are available at the office of the Secretary, Retirement Board, Room 5080, Municipal Center, and he or his authorized representative may review same during office hours. General Order No. 16, Series 1958, will familiarize the officer with the procedure to be followed before the Retirement Board.

*Plaintiff's Exhibit No. 1 (Cont'd)*

It is further requested that Private Blohm be directed to initial this memorandum and return the original to the Secretary, Retirement Board.

FOR the Retirement and Relief Board:

/s/ Isabelle G. Olsen
Secretary

/s/ Pvt. James R. Blohm
March 26, 1962
7:10 a.m.

Served:
Capt. J.H. Byrd

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PLAINTIFF'S EXHIBIT NO. 1 (Sheet 26)

P. D. FORM 57—REV. 8-1-50

NAME BLOHM, James R.

DATE APPOINTED March 16, 1951

BADGE NO. 212

REVOLVER MAKE AND NO. ~~Colt Commando 38-39~~ Saw 38 C-172-886

DATE OF LEAVING SERVICE

REASON

DATE OF BIRTH September 15, 1927

BIRTHPLACE Indian Rocks, Florida

WHERE NATURALIZED

DATE NATURALIZED

EDUCATION High School graduate

FORMER OCCUPATION Painter

MARITAL STATUS Married—Janice

| DATE | ASSIGNMENTS, TRANSFERS, PROMOTIONS, COMMENDATIONS, COMPLAINTS, AND DISCIPLINARY ACTION |
|---|---|
| 3-16-51 | Appointed a Private, Class I in the Metropolitan Police Force, D.C., $3,077.3 per annum, subject to a probati mary period of one year, effective on and aft March 16, 1951, vice original vacancy. Approved by Civil Service Cert. No. P-716-6-59. (C.O. 95:023 dated March 6, 1951) (P.D. 01.8917/12) |
| 5-7-51 | Transferred to the Third Precinct. |
| | [illegible] |
| 3-16-52 | Promoted to CLASS II. |

[redacted]

| | |
|---|---|
| 7-22-52 | Commended by the Major and Superintendent, jointly with several other officers, for the excellent police investigation which resulted in the arrest of Leola P. Pearson, col., wanted for the murder of Alfred Ross and the cutting of Katherine Frye. |
| 3-16-53 | Advanced to CLASS III. |
| -1-53 | Transferred from the 3rd Precinct to the Traffic Division. |
| -1-53 | Assigned to duty on motorcycle, $390 AC per annum. (C.O. 4235-B-6 dated 6-26-53 and P.C. 01.9471/21) |
| 3-16-54 | **Advanced to CLASS IV.** |
| PR 1 7 1959 | COMPLETED IN SERVICE TRAFFIC TRAINING COURSE |
| JL 1 1959 | 1(e)6 |

PLAINTIFF'S EXHIBIT NO. 1 (Sheet 27)

NAME BLOHM, James R. [redacted] APPOINTED March 16, 1951

PLAINTIFF'S EXHIBIT NO. 1 (Sheet 28)

P D FORM 57 -REV 9-1 50

**NOT FOR PUBLICATION**

NAME **BLOHM, James R.**

DATE APPOINTED

BADGE NO

REVOLVER (MAKE AND NO.)

DATE OF LEAVING SERVICE

REASON

DATE OF BIRTH

BIRTHPLACE

WHERE NATURALIZED

DATE NATURALIZED

EDUCATION

FORMER OCCUPATION

MARITAL STATUS

ASSIGNMENTS, TRANSFERS, PROMOTIONS, COMMENDATIONS, COMPLAINTS, AND DISCIPLINARY ACTION

| DATE | |
|---|---|
| 7-17-57 | **Injury - while on duty on June 20, 1957. Officer was operating motorcycle, property of Metropolitan Police Department and was in collision with an automobile. Automobile pulled out in front of Officer Blohm causing motorcycle to strike car at left front. Officer was thrown 95 feet from the motorcycle. Removed to Casualty Hospital. Treated for contusion to head; concussion; multiple contusions and abrasions of upper extremities; contusions to buttocks and back; left acromio-clavicular separations; fract. 4th metacarpal rt. hand; fract. rt. ulna. Condition critical. (Dr. J. B. Harrell) (P.D. 16.13007; CCR 36422)** |

Name BLOHM, James R. Date appointed March 16, 1951

| DATE REPORTED SICK | TIME | TOUR OF DUTY | DATE RETURNED TO DUTY | CLINIC VISITS | HOUSE VISITS | TOTAL DAYS ABSENT | TREATED FOR— | DOCTOR |
|---|---|---|---|---|---|---|---|---|
| 5-14-51 | | | 5-22-51 | 1 | | 2 | Cold | |
| 2-29-52 | | | 3-25-52 | 1 | | 1 | Dysentery | |
| 5-27-52 | | | 6-1-52 | 2 | | 4 | Pneumonia | " |
| 8-12-52 | | | 8-15-52 | 1 | | 1 | Earache | " |
| 8-19-52 | | | 8-22-52 | 1 | | 1 | Otitis External | " Chas. |
| 1-9-53 | | | 1-9-53 | 2 | | 5 | Cold | " Wallace |
| 8-22-53 | | | 8-29-53 | 2 | | 5 | Contusion L Shoulder | " Wallace |
| 7-13-54 | | | 7-19-54 | 2 | | 4 | Pneumonia | " " |
| 2-14-55 | | | 2-18-55 | 1 | | 2 | " | " " |
| 11-12-55 | | | 11-14-55 | | | 2 | [illegible] | |
| 11-21-55 | | | 11-21-55 | 1 | | 1 | [illegible] | |
| 12-16-55 | | | 12-31-55 | 5 | | 11 | [illegible] | |
| 2/25/56 | | | 3/2/56 | 2 | | 4 | Cold | |
| 9-24-56 | | | 9-26-56 | 2 | | 2 | Cold | |
| 1-13-57 | | | 1-21-57 | | | 5 | [illegible] | |
| 2/5/57 | | | 2/6/57 | | | 1 | [illegible] | |
| 3/5/57 | | | 3/6/57 | | | | [illegible] | |
| 6/24/57 | | | 12/2/57 | 25 | | 117 | Fx R. ulna shaft Cerebral Concussion | |
| 11/6/58 | 7 PM | 7 | 11/8/58 | | 1 | 2 | [illegible] | |
| 11/3/58 | 12 PM | 6A | 11/8/58 | 3 | 3/5 | 5 | Cold | |
| 2/24/59 | 11 PM | 8 | 2/28/59 | 2 | 5/5 | 4 | Bronchitis | |
| 6/24/59 | 3 PM | 6P | 7/3/59 | 2 | 5/5 | 5 | Tonsilitis | |
| 8/4/59 | 11 PM | 6A | 8/10/59 | 2 | 5/5 | 6 | Gastroenteritis | |
| 9/14/60 | 12 AM | 8 AM | 2/5/61 | 4 | 5/5 | 16 | Headaches | |
| 3/8/60 | 5 PM | 8 AM | 3/10/60 | 1 | 1/1 | 1 | Flu | |

P.D. Form 61

BLOHM, JAMES R. Pvt T.D. APPTD. 3/16/51

| DATE REPORTED SICK | TIME | TOUR OF DUTY | DATE RETURNED TO DUTY | CLINIC VISITS | HOUSE VISITS | TOTAL DAYS ABSENT | TREATED FOR— | DOCTOR |
|---|---|---|---|---|---|---|---|---|
| 3/4/60 | 8 H | 16 A | 3/14/60 | 3 | 3 4 | 7 | Sore throat [illegible] | [illegible] |
| 4/4/60 | 3 P | 16 A | 4/5/60 | 1 | 1 | 2 | Headache | [illegible] |
| 5/24/60 | 5 A | 16 A | 6/26/60 | 7 | 5 | 13 | [illegible] | [illegible] |
| 10/26/60 | 6 A | 8 | 11/1/60 | 2 | 1 | 4 | [illegible] | [illegible] |
| 11/7/60 | 7 A | 16 A | 11/22/60 | 3 | 1 | 5 | [illegible] | [illegible] |
| 11/28/61 | 4 A | 16 A | 12/2/61 | ✓ | 5 | 4 | Flu | [illegible] |
| 12/13/61 | 12 M | 8 A | 12/16/61 | ✓ | 5 | 4 | Pregnancy | [illegible] |
| 1/3/62 | 2 P | 16 A | 1/4/62 | ✓ | 5 | 2 | Pregnancy | [illegible] |
| 2/5/62 | 10 A | 16 A | 2/11/62 | 6 | 1 | 10 | [illegible] | [illegible] |

BLOOM, JAMES R. #3 Pct APPTD. 3/16/51

PLAINTIFF'S EXHIBIT NO. 2

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

[Filed Nov. 3, 1.964]

REPLY TO:
499 PENNSYLVANIA AVE., N.W.
WASHINGTON 1, D.C.

PERSONNEL OFFICE

September 11, 1962

Maurice A. Guervitz, Esq.
Attorney at Law
1010 Vermont Avenue, N.W.
Washington, D.C.

Dear Mr. Guervitz:

Enclosed is a corrected copy of the report submitted by the Personnel Officer to the Commissioners concerning the facts developed by the Police and Firemen's Retirement and Relief Board in the case of Private James R. Blohm of the Metropolitan Police Department. This was previously incorrectly shown as Joseph R. Blohm.

Very truly yours,

/s/ Victor A. Howard
Acting Chairman
Police and Firemen's Retirement
and Relief Board

Enclosure

*Plaintiff's Exhibit No. 2 (cont'd)*

September 11, 1962

MEMORANDUM TO THE COMMISSIONERS, D.C.:

Pursuant to the provisions of Commissioners' Order No.60-2394, dated November 2, 1960, the following statement is submitted relative to the facts developed by the Police and Firemen's Retirement and Relief Board concerning the case of Private James R. Blohm of the Metropolitian Police Department at the hearing on April 5, 1952.

The Board consisted of:
Victor A. Howard, Chief, Administration and Safety Division
Acting Chairman
William F. Patten, Assistant Corporation Counsel, D.C.
Dr. Delbert P. Johnson, Chief, Special Services Division,
Bureau of Mental Health, D.C.
John R. Barry, Chief Instructor, D.C. Fire Department.
John E. Winters, Deputy Chief of Police, Metropolitan Police
Department
Present:
Dr. Hyman D. Shapiro, Member, Board of Police and Fire Surgeons
Private George Whaler, President, Policeman's Association

Dr. Hyman D. Shapiro presented the report of the Board of Police and Fire Surgeons relative to the conditions present in Private Blohm. The diagnosis is a psychophysiological musculoskeletal reaction, tension headache of a vascular type.

Private Blohm had been injured in a motocycle accident June 20, 1957. Recurrent headaches since that time had resulted in extensive treatment and medical review.

Dr. Shapiro indicated that he and Dr. Rizzoli, a local physician specializing in neurology, could not relate the headaches to the injury.

*Plaintiff's Exhibit No. 2 (cont'd)*

A review of the record and the testimony supplied at the hearing failed to show substantial evidence on which the Police and Firemen's Retirement and Relief Board could conclude that Private Blohm's disability resulted from police duty. Accordingly he was retired by unanimous action of the Police and Firemen's Retirement and Relief Board for disability not arising from the performance of duty.

Henry F. Hubbard
Personnel Officer, D.C.

PLAINTIFF'S EXHIBIT NO. 3

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
WASHINGTON 4, D. C.

G. M. THORNETT
SECRETARY
F. L. TIMMONS, JR.
ASSISTANT SECRETARY

BOARD OF COMMISSIONERS
WALTER N. TOBRINER
PRESIDENT
P. J. CLARKE
BRIGADIER GENERAL, U. S. ARMY
JOHN B. DUNCAN

October 18, 1962

[Filed Nov. 3, 1964]

Mr. Maurice A. Guervitz
Attorney at Law
1010 Vermont Avenue, N.W.
Washington 5, D.C.

Dear Mr. Guervitz:

Reference is made to the case of Private James R. Blohm of the Metropolitan Police Department wherein, through you, he appealed from the action of the Police and Firemen's Retirement and Relief Board retiring him for disability not incurred in the performance of duty as a policeman, said action having taken effect from and after April 30, 1962.

At their Board Meeting on Thursday, October 4, 1962, when you were present, the Commissioners considered this appeal and upon conclusion of the testimony voted to take the matter under consideration. Subsequently, at their Board Meeting on Thursday, October 18, 1962, after having reviewed the record, the Commissioner voted to deny the appeal and to sustain the action of the Police and Firemen's Retirement and Relief Board in ordering the retirement of Private Blohm for disability not incurred in the line of duty effective from and after April 30, 1962.

Sincerely yours,

/s/ F.L. Timmons, Jr.
F. L. TIMMONS, JR.
Assistant Secretary
Board of Commissioners, D.C.

[Filed November 3, 1964]

NOTICE OF APPEAL

Notice is hereby given this 3rd day of November 1964, that JAMES R. BLOHM, plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of October, 1964, in favor of Walter N. Tobriner, et al, defendant herein against said James R. Blohm, plaintiff.

MAURICE A. GUERVITZ
Attorney for Plaintiff
1010 Vermont Avenue, N.W.
Washington, D.C.

PROCEEDINGS

The Clerk: Blohm versus Tobriner, et al.

2 Mr. Guervitz: Ready for the plaintiff.

Mr. Umstead: Ready for the defendants, Your Honor.

The Court: Very well. You may proceed.

* * *

3 The Court: Let me ask both of you this: When you gentlemen are making use of the statutes, it isn't necessary for the reporter to copy all these sections of the Code?

Mr. Guervitz: No, Your Honor.

Mr. Umstead: No, Your Honor, other than to take the specific reference.

The Court: Suppose we read them as we go on, or I will read them. Title 4, Sec. 525, I have read that. Medical and hospital service.

Mr. Guervitz: Right, sir.

Your next section will be 526, Your Honor.

The Court: All right.

Mr. Guervitz: That is, I think, the 40 per cent item, Your Honor.

The Court: That is right.

Mr. Guervitz: Title 4, Sec. 527.

The Court: That is the 66-2/3.

Mr. Guervitz: Now, Your Honor, I don't know whether that is 527(a) or (b), but the Public Law comes next, Public Law 87-857, which becomes part of Title 4, Sec. 527. I think the new designation is Title 4, Sec. 527(b). I am not sure, though, Your Honor. But this is Public Law 87-857.

Mr. Umstead: It is 4-527, Item two.

Mr. Guervitz: The first one would be Item one. And 527 (2). One and two.

* * *

5 Mr. Guervitz: Your Honor, I suppose it is stipulated that we have exhausted our administrative remedies to be before His Honor.

Mr. Umstead: I know of no other administrative remedies that they can follow, Your Honor.

* * *

7 Mr. Umstead: What I had in mind, Your Honor, which might be helpful is, since I have a copy of the things we have agreed upon, and I hope it is comparable and identical with yours, if you would just follow along and make certain it is what you have. Letter of April 17, 1962, from the Chairman of the Retirement Board, Mr. Howard.

* * *

Mr. Umstead: Then we have the five-member board, under date of April 5. It just shows who was at the hearing.

* * *

Mr. Umstead: And Mr. Guervitz will stipulate it shows it was unanimous.

Mr. Guervitz: Yes.

8 Mr. Umstead: Under date of April 5, 1962, a transcript of hearing consisting of 16 pages, Your Honor.

Following that is the Board of Police and Fire Surgeons form signed by Dr. B.F. Denn, Jr., which has certain notations on it dated March 13, 1962, at the bottom of the left-hand corner, Your Honor.

The Court: All right.

Mr. Umstead: Following that, a letter of 13 February 1962 from Dr. Hugo Rizzoli.

The Court: All right.

Mr. Umstead: A letter of March 1962, 1 March 1962.

The Court: Right.

Mr. Umstead: One, December 23, 1959, from Doctor Rizzoli.

The Court: Yes.

Mr. Umstead: Two pages on that one. A letter dated March 22, 1962, from the Retirement Board secretary through the Chief of Police to Officer Blohm concerning his rights before the Board.

The Court: Yes.

Mr. Umstead: A half sheet. It bears no date but the date of birth shows September 5, 1917.

The Court: Right.

Mr. Umstead: Three pages. And the log referred to by Mr. Guervitz showing date of appointment, March 16, 1951.

The Court: Right.

Mr. Umstead: Last entry being under date February 5, 1962, by Doctor Esch.

The Court: Yes.

* * *

The Court: For the purpose of the record, why don't I have the clerk mark this as Exhibit 1?

Mr. Umstead: Shall we mark it joint exhibit? It is really not the plaintiff's or the defendants' exhibit.

The Court: I have no feeling about it.

* * *

Mr. Umstead: And I offer it also.

(Report of hearing before the Board marked Plaintiff's Exhibit No. 1 and received in evidence.)

* * *

10 Mr. Guervitz: This would be Plaintiff's Exhibit No. 2. It is a letter of September 11, 1962, from the Acting Chairman of the Police and Firemen's Retirement Board, inclosing a memorandum to the Commissioners signed by Henry F. Hubbard, Personnel Officer. I offer that, Your Honor, as part of the record.

* * *

11 That would be No. 2.

(Letter dated September 11, 1962, of Acting Chairman of the Board was marked Plaintiff's Exhibit No. 2 and received in evidence.)

Mr. Guervitz: No. 3, Your Honor, for identification, and admission which I think we have agreed upon, letter of October 18, 1962, addressed by the Assistant Secretary, Board of Commissioners, to Maurice A. Guervitz, attorney for the plaintiff, containing the Board's finding with reference to the appeal.

Mr. Umstead: That is the Board of Commissioners.

The Court: That is what brings you here. In other words, finding not incurred in the line of duty.

Mr. Guervitz: That is right.

(Letter dated Oct. 18, 1962, from Board of Commissioners to Mr. Guervitz marked Plaintiff's Exhibit No. 3 and received in evidence.)

12 Mr. Guervitz: We have further exhibits, Your Honor. As Exhibit No. 4, we would like to present to His Honor the personnel records and the medical records of the plaintiff, which is a part of the leave records, consisting of a square card-like sheet, and stating James R. Blohm, T.D. Precinct, motorcycle, 5702 21st Place, Hillcrest Heights, Maryland. D-e-s-c-h, hour and date reported sick: 8:00 a.m., 3/14/60. Tour of duty: 10:00 a.m. Days off: Sunday-Wed. Dates

report to clinic by doctor's orders. Station of Commanding Officer William L. Liverman. Hour and date of return to duty: 3/24/60. Number of days allowed: seven. And then in the lower right-hand: Clinic or other visits: 3. Diagnosis: Post traumatic headaches. Clerk notified of return, V-o-g-e-l. Signature of member of Board of Surgeons, and this is reported to be his signature: J.B. Harrell, M.D.

Mr. Umstead: It is a record of the District of Columbia.

Mr. Guervitz: That is stipulated, a record of the District of Columbia, and we stipulate that the information I gave should be entered as our Exhibit No. 4.

Mr. Umstead: There is no copy of that. And in lieu of that, will Your Honor accept his reading it?

The Court: Certainly.

* * *

13 The Court: We have treated that as 4. It is not really "4".

Mr. Umstead: No, it is not. I will stipulate to it.

* * *

The Court: The contents of it have been stipulated to and you have read it in the record.

* * *

14 Mr. Guervitz: Your Honor, we will also stipulate that the District of Columbia paid for all medical services furnished to Mr. Blohm by reason of these headaches from the time he was first treated until time of his retirement.

Mr. Umstead: I agree, Your Honor, that Mr. Blohm has paid not ten cents in so far as all of the workup and everything else that was done for him by the Metropolitan Police Department, on behalf of the District of Columbia Government.

Mr. Guervitz: Now, also, on report of excess sick leave, file 161.4194/2--

The Court: Excess sick leave?

Mr. Guervitz: I am sorry. This sheet is headed: Report of Excess

Sick Leave.

The Court: Is that going to bear a number?

Mr. Guervitz: And it bears file number 161.4194/2. Name: Private James R. Blohm. Date: June 30, 1960. And it has a stamp on here: Received July 6, 1960, C-o-m-r. Commissioner McLaughlin. And it reads:

To the Board of Surgeons:

Records indicate six sick absenteeism during the current calendar year as follows: in the case of the above-named officer:

Date sick: 1/14/60, 17 days, headaches, Diagnosis: headaches.

* * *

15 Date sick: 1/14/60, 17 days. Diagnosis: headaches.

Date sick: 2/8/60. Days, 10. La grippe, diagnosis.

Date sick: 3/14/60, 7 days, post traumatic headaches.

4/4/60, 2 days; diagnosis, headaches.

5/24/61, 18 days, headaches, J.B.H. in brackets.

Mr. Umstead: Stands for Doctor Harrell.

Mr. Guervitz: Total days absent, 54. Total days excess, 24. Previously allowed, 6. The Board will submit report and recommendation as to allowance of pay. By direction of the Chief of Police. Howard V. Covell, signed and stamped, saying Executive Officer.

Date in ink: 7/2/60. To the Chief of Police:

The Board is of the opinion that the sick absenteeism of the above-named officer was a direct consequence of an injury received (or disease contracted) in actual performance of duty, as contemplated under the provisions of Section 9, Chapter 34 of the Police Manual, and not due to or complicated by vicious habits or carelessness.

16

The Board therefore recommends allowance of pay for the period indicated. And signed, Chairman, Board --

The Court: You are relating to that the thirty-day excess?

Mr. Guervitz: Yes. Signed, Chairman, Board of Surgeons. And I can't read his signature.

Mr. Umstead: I can, Your Honor. That is Dr. John A. Reid, now deceased.

Mr. Guervitz: Date, July 6, 1960. Then down at the bottom of the page:

Through the Commissioners, D.C.

This appears to be a case coming within the purview of that provision of the Police Manual authorizing the extension by the Commissioners of sick leave in excess of 30 days. I therefore concur in the recommendation of the Board of Surgeons that the pay be allowed 18 days excess sick leave in the case Private James R. 17 Blohm. Signed, J.R. Murray, Chief of Police. Approve, with the approved stamp, Commissioners, D.C., July 7, and initials.

Then there is also a stamp, approved by the Commissioners of the District of Columbia sitting as a Board July 7, 1960, signed G.N. Thronet, Secretary. And this was received July 8, at 2:26 p.m. from Metropolitan Police, D.C.

Mr. Umstead: I stipulate that that is a record, and Mr. Guervitz has read it correctly, of the District of Columbia. I do not, however, stipulate its controlling characterization.

The Court: I understand.

* * *

19 The Court: What I am saying to you is this: I have accepted, by virtue of the stipulation, there were thirty days excess leave, which was granted by the Board of Commissioners on the recommendation of the Police Department.

* * *

20 The Court: Before you leave this, I am now understanding that this man had sick leave of 54 days, and that there were excess periods of 24 and 6, adding up to 30. Thirty days excess leave is approved by the Police Department and ultimately by the Commissioners, that is what you want,isn't it?

Mr. Guervitz: Yes. Total days absent was 54. Total excess, 24, Your Honor. Previously allowed, 6 days.

The Court: Which added to the 24 makes 30.

Mr. Guervitz: Now, Your Honor, under the same type of report, in excess sick leave under April 12, 1960, Mr. Blohm was granted 4 days excess sick leave.

* * *

22 The Court: Why don't you give me the days which you say these records indicate were excess days, and further, I assume you want to show that those excess days were approved by the Police Department and ultimately by the Commissioners, and that total, instead of what I now have, 30, may be 34 or 35.

* * *

Mr. Guervitz: Your Honor, we have gone over the records. We have come to a stipulation that the excess sick leave that was taken by the plaintiff up to November 1960 -- the report I gave you, Your Honor, is 28 days, the excess sick leave paid for, 28 days.

* * *

27 Mr. Umstead: Mr. Guervitz, will you stipulate with me that the action of the Retirement Board was in fact unanimous in April 1962?

Mr. Guervitz: Yes.

* * *

28 Mr. Umstead: The new law became effective, as Your Honor will note, in your Public Law, approved October 23, 1962.

Mr. Guervitz: Yes, Your Honor; that is correct. I will stipulate to that.

* * *

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 19,052

JAMES R. BLOHM,

Appellant,

v.

WALTER N. TOBRINER, et al.,
Board of Commissioners, D. C.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia



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## STATEMENT OF QUESTION PRESENTED

In the opinion of appellees, the question is:

Where there is in the whole of the administrative record substantial evidence from which the administrative authority could have found, as it did, that appellant's disability did not result from the performance of police duty, did not the court below, by refusing to substitute its judgment, properly deny appellant the mandatory injunctive relief which he sought?

# I N D E X

Page

## SUBJECT INDEX



## CASES CITED



## DISTRICT OF COLUMBIA CODE, 1961, CITED

## OTHER AUTHORITIES CITED



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* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
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For The District Of Columbia

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# BRIEF FOR APPELLEES

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## COUNTER-STATEMENT OF THE CASE

On March 16, 1951, appellant, at age 23, was appointed a member of the Metropolitan Police Department and, in 1953, was assigned to the Traffic Division as a motorcycle officer (J. A. 23-24, 41). While he was serving in that capacity, the Board of Police and Fire Surgeons, on March 13, 1962, unanimously

recommended that he be retired on account of disability (J. A. 11, 16, 34). The recommendation recited that appellant was disabled as a result of "Psychological muscularskeletal reaction, tension headache" (J. A. 34).

On April 30, 1962, the Police and Firemen's Retirement and Relief Board (hereafter referred to as the Retirement Board), following a hearing, unanimously ordered that appellant be retired for disability not incurred in the performance of duty (J. A. 14, 55). On appeal to the Commissioners of the District of Columbia, the action of the Retirement Board was, after a hearing by the Commissioners, sustained (J. A. 47). Thereafter, appellant filed in the court below a complaint for mandatory injunction to require appellees (1) to set aside their order affirming the action of the Retirement Board pursuant to Section 4-526, D. C. Code, 1961 (retirement for disability resulting from injuries received or disease contracted other than in the performance of duty), and (2) to enter instead an order retiring appellant under Section 4-527, D. C. Code, 1961 (retirement for disability resulting from injuries received or disease contracted in the performance of duty) (J. A. 1). Following the filing of an answer to the complaint, the case came on for hearing on an agreed statement of facts, and a

stipulation of the parties as to the pertinent portions of the administrative record (J. A. 48-55). By memorandum and order entered October 9, 1964, the trial court denied appellant a mandatory injunction and dismissed the complaint (J. A. 10-12). This appeal followed on November 3, 1964 (J. A. 48).

## The Administrative Proceedings

At the hearing conducted by the Retirement Board on April 5, 1962, there was evidence in substance as follows:

On December 23, 1959, appellant was referred to Dr. Hugo V. Rizzoli, a neurosurgeon (J. A. 16, 36). Appellant told Dr. Rizzoli that he had been suffering from headaches for the past year and a half; that they were localized in a small area in the right side of the forehead, and that they disappeared after taking medication or on going to bed (J. A. 36). Appellant's medical history indicates that he was treated for a cerebral concussion following a motorcycle accident on June 20, 1957, and "* * * that the symptoms referable to his head following that accident cleared up after a few months * * *" (J. A. 37). Appellant denied that he had any emotional stress or strain, but Dr. Rizzoli reported that he had reason to believe appellant may well have some

emotional problems (J. A. 37). Dr. Rizzoli also reported that "[t]here is no evidence of increased intracranial pressure and I do not believe his headaches are due to a space-taking lesion or to a subdural hematoma. I feel it is more likely that his headaches are on a tension or allergic basis" (J. A. 37).

In a supplemental report submitted March 1, 1960, Dr. Rizzoli stated that an electroencephalogram and skull x-rays taken at the Washington Hospital Center were negative (J. A. 35). He further stated that the headaches were sharp in character and not of the throbbing variety, and that "[i]t is still my opinion this is a vascular type headache, either induced by tension or some allergic phenomenon" (J. A. 36).

On March 22, 1960, Dr. Rizzoli reported further that appellant had been to the National Institutes of Health, and "[h]is workup there, including a brain scan, was found to be entirely negative. * * *" Dr. Rizzoli stated "[i]t is still my impression that this is a vascular type headache on a tension or allergic basis, * * *" and that the headaches tend to disappear when appellant falls asleep. Dr. Rizzoli could see no reason why appellant could not return to duty (J. A. 38).

Dr. Rizzoli saw appellant again approximately one year and a half later, and, on February 13, 1962, reported that the neurological examination remains essentially negative, and that "[i]t is again my impression that these are vascular type headaches, possibly on a tension basis * * *" (J. A. 35). Arrangements were made for appellant to have a supraorbital nerve block later the same month (J. A. 35).

Dr. Hyman D. Shapiro, a member of the Board of Police and Fire Surgeons, testified that appellant had been under his observation and care since December 1, 1960, and that appellant was sent to him by Dr. Esch, also of the Board of Police and Fire Surgeons, " * * * because of recurrent right frontal headaches which he stated was of one year's duration * * *" (J. A. 16). Dr. Shapiro stated that appellant's history is noncontributory, except that his father died in 1948 of a cancer of the head. Appellant feared that he too had cancer of the head (J. A. 16). Dr. Shapiro stated that, "[a]t the time I saw him on December 1, 1960, I felt that this was not the type of headache that one sees as a post-traumatic type of headache. However, this did not eliminate the possibility. My opinion was that he had a vascular

or tension type of headache * * *" (J. A. 18). In response to a question of whether there is objective medical findings of a post-traumatic nature, Dr. Shapiro stated:

> "This man has had very intensive treatment; he's had EEGs brain waves, he's had arteriograms, he's had a pneumoencephalogram, he's had nerve blocks; and neurologic examination didn't reveal anything, so both Dr. Rizzoli and I feel that we cannot relate these headaches to the injury. * * * Although, as I said, no one can absolutely do this, but on a basis of all the medical data it is impossible to show that this is a result of same" (J. A. 19).

Continuing his testimony, Dr. Shapiro stated that, following a motorcycle accident in June 1957, appellant was off duty until December of the same year (six months) recuperating from fractures of his right upper extremity and left shoulder, and that:

> "* * * He [appellant] states he had no residual headaches from the time of the injury until the time he returned to duty, so there was no continuity according to the history. * * * [S]o as far as I know there has been nothing to indicate that these headaches are the result of any surgical condition or any orthopedic condition or anything outside of the nervous system" (J. A. 20).

Appellant testified that he never had any headaches prior to the motorcycle accident, and that the headaches "* * * weren't bad afterwards until I'd say about a year; and they grew worse" (J. A. 25). He attributes the headaches to the motorcycle accident (J. A. 26). Following the questioning of appellant by Dr. Johnson, a medical doctor and member of the Retirement Board, as to the location and duration of the headaches, Dr. Shapiro added:

> "May I add, Dr. Johnson, when he was last referred to me by Dr. Esch, February 26, 1962, he was complaining of 'needle' sensations in his head; so you can see why we made the diagnosis; I mean, it was that varied type of symptomatology" (J. A. 27).

In response to a question of whether the headaches have been continuous since the accident, appellant replied:

> "Oh, no, they haven't been continuous; I'd say about a year they--you know--begin to get bad and I started complaining about them--and I started complaining about them about a year afterwards" (J. A. 29).

Appellant's sick leave record reveals that he first took sick leave for headaches on January 14, 1960 (J. A. 42).

## SUMMARY OF THE ARGUMENT

The Retirement Board, subject to review of its orders by the Commissioners, has the responsibility of determining whether a disability, necessitating the retirement of a police officer, resulted from the performance of police duties. Since there is in the record a rational basis for the administrative determination that appellant's disability was incurred other than in the performance of duty, the mandatory injunctive relief sought by appellant was properly denied.

## ARGUMENT

### I

### There is substantial evidence in the administrative record to support the finding that appellant's disability did not result from the performance of police duty.

The parties are in agreement that appellant is physically incapacitated for further duty as a police officer and that he should be retired. The dispute, however, is whether the disability is service connected or non-service connected. If service connected, he is entitled to an annuity of not less than 66 2/3 per centum of his basic salary, and if non-service connected, he is entitled to an

annuity of not less than 40 per centum of his basic salary. Sections 4-526 and 4-527, D. C. Code, 1961.

Section 4-527, D. C. Code, 1961, which provides for retirement at the higher rate, reads, in pertinent part, as follows:

> "Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity * * * [of not less than 66 2/3 per centum of his basic salary at the time of retirement]."

Nowhere in the administrative record is there a scintilla of medical evidence that appellant's headaches, which constitute his disability, were either caused by or aggravated by police duties. In fact, all the medical evidence is to the contrary.

Dr. Rizzoli, a neurosurgeon to whom appellant was referred in December of 1959, was unwavering in his opinion that appellant's headaches were not caused by a motorcycle accident in which he had been involved about one and one-half years earlier, but that the headaches are of the vascular type, induced either by tension or some allergic phenomenon. Dr. Rizzoli made this diagnosis in

his original report in 1959, and repeated it in supplemental reports through 1962, when appellant was retired. In addition to the fact that none of the many and varied tests and examinations which were made of appellant disclosed any residuals from the motorcycle accident, appellant told Dr. Rizzoli that "* * * the symptoms referable to his head following that accident cleared up after a few months * * *" (J. A. 37).

Dr. Shapiro, a member of the Board of Police and Fire Surgeons, who had appellant under his observation and care since December 1, 1960, testified that:

> "This man has had very intensive treatment; he's had EEGs brain waves, he's had arteriograms, he's had a pneumoencephalogram, he's had nerve blocks; and neurologic examination didn't reveal anything, so both Dr. Rizzoli and I feel that we cannot relate these headaches to the injury. * * * Although, as I said, no one can absolutely do this, but on a basis of all of the medical data it is impossible to show that this is a result of same" (J. A. 19).

Dr. Johnson, a medical doctor and member of the Retirement Board, questioned appellant and Dr. Shapiro as to the nature and duration of the headaches and the results of the tests, and, since he joined in the unanimous decision of the Retirement Board, apparently agreed with the diagnosis of Dr. Rizzoli and Dr. Shapiro.

The only non-medical evidence before the Retirement Board was the testimony of appellant, and he made no contention that his duties as a policeman aggravated his condition. He stated merely that he did not suffer from headaches prior to the motorcycle accident and, therefore, deduced that the headaches were caused by the accident. But, as Dr. Shapiro pointed out, "* * * [h]e [appellant] states he had no residual headaches from the time of the injury until the time he returned to duty, so there was no continuity according to the history * * *" (J. A. 20). Appellant admitted at the hearing that his headaches have not been continuous since the accident, but did not specifically state how soon after the accident they started (J. A. 29). He testified that he began complaining about them about a year after the accident (J. A. 29). It is undisputed that he did not begin to lose time from work as a result of the headaches until January 14, 1960 (J. A. 42).

From the foregoing it is apparent that there is in the administrative record substantial evidence to support the finding of the Retirement Board that appellant's disability did not result from the performance of police duties.

Appellant contends, however, that Dr. Harrell, of the Board of Police and Fire Surgeons, diagnosed his condition as "post

traumatic headaches." Appellant bases this contention on an entry in his sick leave record where, opposite the name Dr. Harrell, there appears, under the heading "Treated for," the words "Post Traumatic Headaches." The date of this entry is March 14, 1960. However, prior thereto, on January 14, 1960, and subsequent thereto, on April 4, 1960, and May 24, 1960, there appears in the same report opposite the name Dr. Harrell and under the heading "Treated for," the single word "Headaches." The single isolated entry of March 14, 1960, particularly when considered with the other three entries attributed to Dr. Harrell, would hardly support a finding that Dr. Harrell had diagnosed appellant's headaches as being post-traumatic. In any event, assuming that Dr. Harrell was once of the view that appellant's headaches were post-traumatic, he obviously, upon further study and as a result of the many tests which were later administered to appellant, changed his view, because he joined in the unanimous recommendation of the Board of Surgeons that appellant be retired " * * * on the basis that he has a psychophysiological musculoskeletal reaction, tension headache * * *" (J. A. 16).[1]

---

[1] Appellant's assertion that the Retirement Board was unaware of Dr. Harrell's notation in the sick leave record is not supported by the administrative record. Members of the Retirement Board used this report as a basis for questioning appellant (J. A. 30-31).

But whatever view may be taken of Dr. Harrell's original description of appellant's condition as "Post Traumatic," the order of the Retirement Board, based, as it is, upon substantial evidence, must nevertheless be sustained.

It is well settled that, in the review of such administrative proceedings, the courts are not concerned with whether the facts will support a finding that appellant's disability resulted from police duty, but, instead, whether there is a rational basis for the finding that appellant's disability was non-service connected. Rochester Telephone Corp. v. United States et al., 307 U. S. 125; Cooper v. Retirement Board, etc., 131 Calif. App. Rep. 2d 804, 281 P. 2d 349. As the Supreme Court aptly stated in Rochester Telephone Corp. supra,

> " * * * Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' * * *" (Page 146)

The record discloses, and the parties so stipulated, that, in 1960, appellant was granted 30 days excess sick leave (J. A. 53-55). Appellant contends that because the appellees

granted him excessive sick leave by approving a certification of the Board of Police and Fire Surgeons that he was entitled to such leave due to disability incurred in performance of duty, appellees should not thereafter be heard to say that the disability was incurred other than in the performance of duty. This contention is wholly without merit. In cases where injury or disease is contracted in performance of police duty, members of the Board of Police and Fire Surgeons are authorized by regulation (Metropolitan Police Department Manual, Chapter 38, § 9) to recommend that any disabled officer be granted sick leave in excess of thirty days or that he receive, at District expense, medical treatment not available in District of Columbia facilities. But such authority is limited as stated and cannot be construed as justification for usurping the functions of the Retirement Board or of the Commissioners in the determination of eligibility for retirement. If the law were otherwise, the Retirement Board and the appellees could not properly perform the duties which are entrusted to them by the Congress since they would be bound by the action of the Board of Police and Fire Surgeons. See Section 4-533, D. C. Code, 1961, and Reorganization Order No. 31, D. C. Code, 1961, Title I, Administration, Appendix, Page 100, as amended in Supplement IV, Page 13.

Equally without merit is appellant's contention that the burden of proving that he is entitled to the more favorable retirement under Section 4-527, D. C. Code, 1961, was improperly imposed on him. He attempts to support this contention by referring to some language in a report of the Personnel Officer of the District of Columbia to the Commissioners of the District. In that report the Personnel Officer merely summarized the evidence and findings of the Retirement Board. Since the Personnel Officer was not a member of the Retirement Board, he obviously was in no position to relate the mental processes of such Board.

Proceedings before the Retirement Board and before the appellees are non-adversary in nature. The very purpose of such proceedings is to receive all relevant evidence pertaining to the disability in question in order that a proper determination can be made as to whether it is service connected or non-service connected. The record shows that appellant was adequately advised of the nature of the hearing, of his right to be represented by counsel, of his right to present any evidence which he felt was important (J. A. 39), and that he was afforded every opportunity to present any evidence which he may have had. There was medical evidence that the disability was non-service connected, and there was

non-medical evidence, in the form of appellant's conclusionary statements, that the disability was service connected. Under the circumstances, no question of burden of proof was involved. Appellees' decision should, therefore, be upheld if there is in the administrative record substantial evidence to support it. The uncontroverted facts as related obviously indicate that the action of the Retirement Board and that of appellees was in every respect correct.

II

The October 23, 1962, amendment to the Retirement Act is not applicable to the appellant, who was retired on April 30, 1962.

On October 23, 1962, the Congress amended the Policemen and Firemen's Retirement and Disability Act by adding the following:

* * * * * * *

"(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. * * *" (Section 4-527 (2), D. C. Code, 1961, Supp. IV.)

The Act was amended on a previous occasion on August 21, 1957. Although the Congress, in enacting the amendments of August 21, 1957 (71 Stat. 394), specifically provided that such amendments were to be effective retroactively to October 1, 1956, no such provision for a retroactive effective date was inserted in the amendment of October 23, 1962 (Public Law 87-857). Obviously, therefore, the Congress could not have intended that the latter amendment should be applied retroactively. This is further borne out by the legislative history of the most recent amendment. Appellees deem it unnecessary, however, to set forth the legislative history or to argue in any greater detail the fact that the latest amendment is not retroactive, because, under the evidence in this case, the amendment would be of no benefit to appellant even if it had retroactive application.

There was no suggestion at the hearing that police duties aggravated appellant's condition. The issue is simply whether appellant's headaches were caused by the motorcycle accident in June 1957, or whether they are caused by tension or some allergic phenomenon unrelated to police duties. All the medical evidence relates to and points unerringly to the latter. Therefore, the October 23, 1962, amendment, even if it were retroactive, which it is not, would not be applicable here.

## CONCLUSION

In view of the foregoing, it is respectfully submitted that there is substantial evidence in the administrative record to support the finding that appellant's disability was non-service connected. Therefore, the judgment of the court below was in all respects correct and should be affirmed.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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No. 19,052

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JAMES R. BLOHM,

Appellant,

v.

WALTER N. TOBRINER, et al.,
Board of Commissioners, D. C.,

Appellees.



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## PETITION FOR REHEARING IN BANC

Appellees respectfully petition the Court, pursuant to Rule 26 of its Rules, for a rehearing in the above-entitled cause by the entire Court sitting in banc. The reasons therefor are as follows:

1. Without any warrant in the statute and without citing any other authority, a division of the Court has created a presumption that the disability of a policeman or fireman, retiring under the Policemen and Firemen's Retirement and Disability Act, resulted from an injury received or disease contracted in the performance of official duty.

2. By refusing to apply the substantial evidence rule, a division of the Court departed from the well-settled and controlling opinions of this Court and of the Supreme Court of the United States.

## PRELIMINARY STATEMENT

Appellant, while on duty as a motorcycle officer in the Metropolitan Police Department, was involved in a vehicular accident in which he received a cerebral concussion and various other injuries (J. A. 17). He returned to duty after a period of six months (J. A. 17). Approximately two years after returning to duty he began to take sick leave because of headaches (J. A. 42). His sick leave record shows that he received treatment by various doctors for his headaches and, on one occasion, Dr. Harrell, one of the physicians, noted, under the words "Treated for," the words "Post Traumatic Headaches" (J. A. 43). On other occasions, both before and after this entry, Dr. Harrell merely noted "Headaches" (J. A. 42-43).

Approximately two years after returning to duty, appellant was referred to Dr. Rizzoli, a neurosurgeon (J. A. 36). Appellant told Dr. Rizzoli that he had been suffering from headaches for the past year and a half (J. A. 36). Dr. Rizzoli examined appellant on various occasions and administered many different types of tests,

and in each of his four written reports concluded that the headaches were not caused by the motorcycle accident. In the first report, dated December 23, 1959, Dr. Rizzoli stated "[t]here is no evidence of increased intracranial pressure and I do not believe his headaches are due to a space-taking lesion or to a subdural hematoma. I feel it is more likely that his headaches are on a tension or allergic basis" (J. A. 37). In the second report, dated March 1, 1960, Dr. Rizzoli stated that an electroencephalogram and skull X-rays were negative and that "[i]t is still my opinion this is a vascular type headache, either induced by tension or some allergic phenomenon" (J. A. 36). In the report dated March 22, 1960, he stated that appellant had been to the National Institutes of Health, that "[h]is workup there, including a brain scan, was found to be entirely negative * * *," and that "[i]t is still my impression that this is a vascular type headache on a tension or allergic basis * * *" (J. A. 38). Dr. Rizzoli's final report, dated February 13, 1962, set forth that the neurological examination remains essentially negative, and that "[i]t is again my impression that these are vascular type headaches, possibly on a tension basis * * *" (J. A. 35).

Having failed to respond to any of the treatment he received, including a supraorbital nerve block, and being unable to remain on

the job, the Board of Police and Fire Surgeons, of which Dr. Harrell, referred to above, was a member, recommended that appellant be retired. The recommendation was unanimous, the Board of Surgeons being of the opinion that the disability resulted from a "Psychological muscularskeletal reaction, tension headache" (J. A. 34).

The matter came on for hearing before the Police and Firemen's Retirement and Relief Board, hereinafter referred to as Retirement Board, for a determination of whether the appellant was, in fact, disabled for further duty and, if so, whether the disability resulted from an injury or disease incurred in line of duty or from an injury or disease incurred other than in line of duty. For service-connected disability, appellant would be entitled to an annuity of not less than 66 2/3 per centum of his basic salary, whereas if his disability was non-service connected, he would be entitled to an annuity of not less than 40 per centum of his basic salary. Sections 4-526 and 4-527, D. C. Code, 1961.

Appellant, at no time, contested the fact that he was disabled, but merely contended that his headaches resulted from the motorcycle accident. In addition to the sick leave records and medical evidence set forth above, there was testimony by Dr. Shapiro, who also is a member of the Board of Police and Fire Surgeons, that "[a]t the time

I saw him on December 1, 1960, I felt that this was not the type of headache that one sees as a post-traumatic type of headache. However, this did not eliminate the possibility. My opinion was that he had a vascular or tension type of headache * * * (J. A. 18). In response to a question of whether there is objective medical findings of a post-traumatic nature, Dr. Shapiro stated:

> "This man has had very intensive treatment; he's had EEGs brain waves, he's had arteriograms, he's had a pneumoencephalogram, he's had nerve blocks; and neurologic examination didn't reveal anything, so both Dr. Rizzoli and I feel that we cannot relate these headaches to the injury. * * *Although, as I said, no one can absolutely do this, but on a basis of all the medical data it is impossible to show that this is a result of same" (J. A. 19).

Continuing his testimony, Dr. Shapiro stated that:

> " * * * He [appellant] states he had no residual headaches from the time of the injury until the time he returned to duty, so there was no continuity according to the history. * * * [S]o as far as I know there has been nothing to indicate that these headaches are the result of any surgical condition or any orthopedic condition or anything outside of the nervous system" (J. A. 20).

Following the interrogation of appellant by Dr. Johnson, a medical doctor and member of the Retirement Board, as to the

location and duration of the headaches, Dr. Shapiro stated:

> "May I add, Dr. Johnson, when he was last referred to me by Dr. Esch, February 26, 1962, he was complaining of 'needle' sensations in his head; so you can see why we made the diagnosis; I mean, it was that varied type of symptomatology" (J. A. 27).

On the basis of all the medical evidence in the case the Retirement Board unanimously ordered that appellant be retired for disability not incurred in the performance of duty (J. A. 14, 55). On appeal to the Commissioners of the District of Columbia, the action of the Retirement Board was, after a hearing, sustained (J. A. 47). Thereafter, appellant filed in the court below a complaint for mandatory injunction to require appellees to retire him at the higher pension rate (J.A. 1). Upon consideration of the administrative record, District Court Judge Keech dismissed the complaint (J. A. 10-12). In reversing the judgment of the District Court, a division of this Court held, in effect, that the disability is presumed to be service connected, that the burden of proof to the contrary is on the Police Department, and that the Police Department failed to carry such burden.

## ARGUMENT

**By judicially creating a presumption in favor of the retiree that his disability is service connected and by refusing to apply the substantial evidence rule, a division of the Court has decided a question of substance in a manner contrary to applicable decisions of other divisions of the Court and contrary also to applicable decisions of the Supreme Court.**

The law is so well settled as to hardly require the citation of authority that the function of a court, in reviewing the action of an administrative agency, is limited to a determination of whether there is substantial evidence in the record to support the administrative finding. Circuit Judge Burger, in his well-reasoned dissenting opinion in Hyde v. Tobriner, et al., 117 U. S. App. D. C. 311, 329 F. 2d 879, succinctly stated the governing principle as follows:

> "Under the controlling opinions of this court we are required to affirm if there is any substantial evidence to support the action of the Commissioners. * * *"

The Supreme Court of the United States, in Rochester Telephone Corp. v. United States, et al., 307 U. S. 125, said:

> " * * * Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question.

> 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' * * *" (page 146)

In the case of Cooper v. Retirement Board, etc, 131 Calif. App. Rep. 2d 804, 281 P. 2d 349, the court, in upholding the decision of the Retirement Board that a police officer died from a non-service connected disability, correctly stated the law that " * * * the appellant [widow] must not only show that a finding in her favor would have been supported, but must demonstrate that such finding is compelled, as a matter of law."

Here, as seen from the evidence summarized above, the decision of the Retirement Board has very substantial support in the administrative record. None of the doctors connected with the case supported appellant's contention that his headaches were caused by the motorcycle accident. On the contrary, the Board of Surgeons, including Dr. Harrell who two years previously inserted in appellant's sick leave records under the heading "Treated for" the words "Post Traumatic Headaches," was unanimous in its diagnosis that appellant was disabled as a result of "Psychological musculardskeletal reaction, tension headache" (J. A. 34). Dr. Rizzoli, the neurosurgeon to whom appellant was referred, consistently reported that the headaches were

of the vascular type, brought on by either tension or some allergy. Dr. Johnson, the physician member of the Retirement Board, apparently agreed with this diagnosis, because he joined in the unanimous decision of the Retirement Board. The only contrary evidence was that of the appellant, himself, and even his testimony was inconsistent with the statements he made to his doctors.

In the face of all this consistent medical evidence, a division of the Court, rather than affirming the judgment of the court below as it was required to do under the well-settled decisions of this Court and of other courts throughout the United States, judicially created a presumption in favor of the appellant that his disability was service connected, and held that the burden was on the District of Columbia to prove otherwise. The Policemen and Firemen's Retirement and Disability Act does not, of course, provide for any such presumption, nor does the Act impose any such burden of proof. Significantly enough, the division has cited no authority for its holding to the contrary. But more than this, the decision in this case is inconsistent with the decision of another division of the Court in the case of Taylor v. Tobriner, et al., _____U. S. App. D. C. _____, (No. 18,628, March 4, 1965), Petition for Rehearing In Banc denied April 14, 1965. There the police officer was disabled because of a

heart condition, and was retired for a non-service connected disability. By sustaining the action of the Retirement Board, this Court did not accept appellant's contention that the burden of proof devolved upon the District of Columbia, because the District did not prove, and, indeed, it could not have proved, that the heart disease was non-service connected.

It is clear from a casual reading of the statute (Section 4-533, D. C. Code, 1961), and Reorganization Order No. 31 (Administration, Appendix, p. 13, D. C. Code, Supp. IV, 1965), that the Congress intended that proceedings before the Retirement Board should be non-adversary in nature. The statute provides that:

> "* * * The proceedings * * * shall be reduced to writing and shall show the date of appointment of such member, his age, his record in the service, and any other information which may be pertinent to the matter of such retirement or annuity. * * *" [Emphasis supplied.]

The Reorganization Order provides:

> "In making such findings of fact the Board shall consider the written opinion submitted to it by the Board of Police and Fire Surgeons concerning the physical or mental condition, or both, of the member for whom involuntary separation or retirement is sought, together with all records and testimony of the Board of Police and Fire Surgeons relating to such

> member, and such records and testimony of any other person bearing on the matter before the Police and Firemen's Retirement and Relief Board." [Emphasis supplied.]

The very purpose of the proceedings before the Retirement Board is to receive all relevant evidence pertaining to the disability in question in order that a proper determination can be made as to whether it is service connected or non-service connected. An intolerable situation will be created if proceedings before the Retirement Board should degenerate into adversary actions wherein the Police or Fire Departments or the District Government would be opposing applications of policemen and firemen for service-connected disability allowances. The only fair and reasonable course is that which has been followed for years. In accordance with this practice, appellant was afforded an opportunity to present anything he chose in support of his contention that his disability was service connected, there was no opposition as such, everything helpful or hurtful to appellant was put into the record, and, on the basis of all the evidence, the Retirement Board was amply justified in finding contrary to his position. Since this finding has support in substantial evidence, the division was, under the controlling law, required to affirm the judgment of the court below upholding the decision of the Retirement Board.

## CONCLUSION

Because the division erred in judicially creating a presumption that a policeman's or fireman's disability is service connected, and because of the great impact this ruling will have on most of the cases which have been and will come before the Retirement Board, appellees respectfully submit that the case should be reviewed by the entire membership of the Court sitting in banc.

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## CERTIFICATE OF COUNSEL

I, Chester H. Gray, Corporation Counsel, D. C., attorney for the appellees, do hereby certify that the foregoing Petition for Rehearing In Banc is presented in good faith and not for delay.

CHESTER H. GRAY,
Corporation Counsel, D. C.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing In Banc was mailed, postage prepaid, this 28th day of July, 1965, to Maurice A. Guervitz, Esq., 1010 Vermont Avenue, Northwest, Washington, D. C., Attorney for Appellant.

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